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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE RICHARD SEEBORG, JUDGE

IN RE ORACLE CORPORATION DERIVATIVE)  
LITIGATION. )

) NO. 10-3392 RS

) SAN FRANCISCO, CALIFORNIA

) THURSDAY

) JUNE 2, 2011

) 2:30 O'CLOCK P.M.

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**FOR PLAINTIFFS:**

**COTCHETT PITRE & MCCARTHY LLP**

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BURLINGAME, CA. 94010

650-697-0577

**BY: MARK C. MOLUMPY, ESQUIRE**

**JORDANNA G. THIGPEN, ATTORNEY AT LAW**

**FOR INTERESTED PARTY: JERRY K. CIMMET, ESQUIRE**

177 BOVET ROAD, SUITE 600

SAN MATEO, CALIFORNIA 94402

**650-866-4770**

**AND**

**JOHN M. KELSON, ESQUIRE**

WATERGATE TOWER III

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FURTHER APPEARANCES ON NEXT PAGE.

**REPORTED BY: KATHERINE WYATT, CSR 9866, RMR, RPR**

*OFFICIAL REPORTER - US DISTRICT COURT*

*COMPUTERIZED TRANSCRIPTION BY ECLIPSE*

1 FURTHER APPEARANCES:

2 **FOR DEFENDANT ORACLE:**

3 **MORRISON & FOERSTER**

4 425 MARKET STREET

5 SAN FRANCISCO, CALIFORNIA 94105-2482

6 **BY: JORDAN ETH, ESQUIRE**  
7 **PHILIP T. BESIROF, ESQUIRE**

8 AND

9 **JAMES C. MAROULIS, MANAGING CORPORATE COUNSEL**  
10 ORACLE CORPORATION  
11 500 ORACLE PARKWAY  
12 REDWOOD SHORES, CALIFORNIA 94065  
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1 THURSDAY JUNE 3, 2011

2:30 O'CLOCK P.M.

3 P R O C E E D I N G S

4 THE CLERK: C10-3392, IN RE: ORACLE CORPORATION  
5 DERIVATIVE LITIGATION.

6 COUNSEL, PLEASE STATE YOUR APPEARANCES.

7 MR. MOLUMPY: GOOD AFTERNOON, YOUR HONOR. MARK  
8 MOLUMPY, COTCHETT, PITRE & MCCARTHY FOR THE PLAINTIFF.

9 THE COURT: GOOD AFTERNOON.

10 MR. KELSON: GOOD AFTERNOON, YOUR HONOR. JOHN KELSON  
11 FOR THE PLAINTIFFS.

12 THE COURT: GOOD AFTERNOON.

13 MR. CIMMET: JERRY CIMMET FOR THE PLAINTIFFS, YOUR  
14 HONOR.

15 THE COURT: GOOD AFTERNOON.

16 MS. THIGPEN: JORDANNA THIGPEN FOR THE PLAINTIFFS,  
17 YOUR HONOR.

18 MR. MOLUMPY: I ALSO HAVE MARISA COMPESE FROM MY  
19 OFFICE.

20 MR. ETH: GOOD AFTERNOON, YOUR HONOR. JORDAN ETH AND  
21 PHILIP BESIROF FOR ORACLE AND THE INDIVIDUAL DEFENDANTS.

22 THE COURT: GOOD AFTERNOON.

23 MR. ETH: AND JIM MAROULIS FROM ORACLE FOR ORACLE.

24 THE COURT: GOOD AFTERNOON.

25 WELL, WE ARE HERE ON A MOTION. I'M UNCLEAR ON

1 EXACTLY WHAT RULE UNDER WHICH IT'S BEING BROUGHT, BUT A MOTION  
2 THAT IS TARGETING THE DEMAND FUTILITY ISSUE. AND SO THAT WILL  
3 BE THE FIRST ORDER OF BUSINESS, TO DISCUSS THAT.

4 THERE'S ALSO A MOTION WITH RESPECT TO THE INDIVIDUAL  
5 DEFENDANTS UNDER 12 (B) (6), AND WE CAN ADDRESS THAT, AS WELL.

6 LET ME JUST MAKE A COUPLE OF COMMENTS. THE REFERENCE  
7 I JUST MADE TO WHAT RULE THIS IS BROUGHT UNDER, I KNOW THIS  
8 PARTICULAR MOTION IS STYLED UNDER 41 (B), I HAVE SOME QUESTION  
9 ABOUT WHETHER OR NOT THAT'S THE APPROPRIATE RULE RUBRIC UNDER  
10 WHICH TO BRING THIS MOTION.

11 BUT THE BOTTOM LINE IS I DON'T WANT TO SPEND A LOT OF  
12 TIME ON THAT. I MEAN, YOU CAN -- A MOTION AT THE PLEADING STAGE  
13 GOING TO THE QUESTION OF WHETHER OR NOT DEMAND FUTILITY KICKS  
14 INTO THE FRAY HERE CAN BE BROUGHT IN MY VIEW. I THINK IT MIGHT  
15 BE 12 (B) (6). IT MIGHT BE (12) (B) (1), IF YOU VIEW IT AS A  
16 JURISDICTIONAL ISSUE.

17 SO I PROPOSE NOT TO SPEND A LOT OF THE TIME ON THAT  
18 QUESTION.

19 THE INDIVIDUALS -- JUMPING AHEAD -- THE INDIVIDUAL  
20 DEFENDANTS' MOTIONS UNDER 12 (B) (6) SEEMS TO BE THE BIG  
21 PROCEDURAL QUESTION AS TO WHETHER OR NOT THE ABUSE OF FIDUCIARY  
22 DUTY IS A RULE 8 OR A RULE 9 ISSUE. AND I KNOW THERE'S AN  
23 ARGUMENT THAT -- PROBABLY BOTH SIDES SAY:

24 "WELL, IT DOESN'T MATTER" FOR THEIR VARIOUS  
25 REASONS. BUT THAT LET'S PUT ASIDE FOR THE MOMENT.

1 THE ISSUE IT SEEMS TO ME ON DEMAND FUTILITY IN THIS  
2 CASE COMES DOWN TO THE QUESTION OF WHETHER OR NOT, FOR WANT OF A  
3 BETTER WAY TO PHRASE IT, THE DIRECTORS MUST HAVE KNOWN.

4 AND I KNOW THAT THE PLAINTIFFS ARE SAYING THAT WHAT  
5 THEY HAVE PLED HERE IS ENOUGH TO SHOW THAT THEY DID, INDEED,  
6 KNOW. AND TO SOME EXTENT IT SEEMS TO BE PREMISED ON THE NOTION  
7 THAT THE SCHEME WAS SO VAST IN TERMS OF THE IMPACT ON THE  
8 GOVERNMENT CONTRACTS AND THE NATURE OF IT AND, APPARENTLY,  
9 THINGS THAT ARE GOING OUT IN THE MEDIA THAT EFFECTIVELY THE  
10 DIRECTORS HAVE KNOWLEDGE.

11 AND I HAVE SOME QUESTION ABOUT THAT. I DON'T THINK  
12 THAT THAT'S REALLY ENOUGH. AND WHAT I'M SAYING IS I THINK WE CAN  
13 PUT THIS UNDER VARIOUS CONSTRUCTS. ARE WE USING THE ARONSON  
14 TEST OR THE RALES TEST, AND THIS, THAT AND THE OTHER. AND GET  
15 IN THE WEEDS ON WHICH IS THE OPERATIVE LANGUAGE UNDER THE  
16 OPERATIVE DELAWARE CASE LAW THAT HAS BEEN ADOPTED BY THE  
17 CIRCUIT.

18 BUT, REALLY, WHAT IT DOES COME DOWN TO IS WHETHER OR  
19 NOT THIS IS A CIRCUMSTANCE UNDER WHICH THESE DIRECTORS MUST HAVE  
20 KNOWN, AND IS THAT ENOUGH?

21 AND I HAVE SOME REAL QUESTION ABOUT WHETHER OR NOT IT  
22 IS ENOUGH IN THIS CIRCUMSTANCE. SO THAT'S A VERY GENERAL, I  
23 REALIZE, GLOSS ON A VERY DETAILED AREA OF THE LAW. BUT THAT'S  
24 KIND OF MY GUT REACTION TO IT, IF YOU WILL.

25 SO WHY DON'T I START WITH YOU, MR. ETH? YOU'RE THE

1 MOVING PARTY AND --

2 **MR. ETH:** YES. THANK YOU, YOUR HONOR.

3 **MR. MOLUMPHY:** I'M GOING TO SIT DOWN, YOUR HONOR.

4 **THE COURT:** GO RIGHT AHEAD.

5 **MR. ETH:** AND YOUR HONOR IS CORRECT THAT THE ISSUE  
6 ABOUT 41 (B) IS A COMPLETE RED HERRING. I WOULD SAY THAT  
7 NINETY-EIGHT PERCENT OF THESE CASE JUST SAY IT'S 23.1. AND WE  
8 NOTICE THAT --

9 **THE COURT:** THE PROBLEM WITH 23.1 IS IT MAY BE THE  
10 DELAWARE VARIANT ON 23.1 HAS A PROCEDURAL OPTION TO BRING A  
11 MOTION AS THIS ONE IS STYLED. BUT I DON'T THINK UNDER FEDERAL  
12 23.1 THAT IT IS A PROCEDURAL. IT'S A SUBSTANTIVE RIGHT THAT IT  
13 HAS TO BE -- YOU HAVE TO -- YOU HAVE TO HAVE SATISFIED THE  
14 DEMAND ISSUE, BUT THERE'S NO VEHICLE UNDER 23.1.

15 **MR. ETH:** YOUR HONOR, YOU'RE CORRECT. AND DELAWARE  
16 LAW IS ACTUALLY THE SAME AS -- 23.1 AND DELAWARE IS THE SAME ON  
17 THIS POINT.

18 WE NOTICED FROM YOUR PMC-SIERRA DECISION THAT YOU  
19 POINTED OUT THIS ISSUE.

20 **THE COURT:** RIGHT.

21 **MR. ETH:** AND THAT YOU SAID -- IN THAT CASE IT WAS 12  
22 (B) (6); THIS IS 41. IT DOESN'T MATTER. IT'S 23.1. I THINK WE  
23 ALL AGREE THAT IT'S WHETHER OR NOT THIS COMPLAINT COMPLIES WITH  
24 ONE OF THE BEST ARTICULATED, MOST WELL-KNOWN STANDARDS IN THE  
25 LAW.

23.1 HAS BEEN LITIGATED IN THE NINTH CIRCUIT, THE  
NORTHERN DISTRICT, DELAWARE, HUNDREDS AND HUNDREDS OF TIMES. AND  
THE STANDARD IS AS THE COURT SAYS. YOU CAN LOOK AT ALL KINDS OF  
DIFFERENT ARTICULATIONS, BUT IT'S WHETHER WITH PARTICULARITY  
THEY ALLEGE FACTS SHOWING THAT THERE'S A SUBSTANTIAL LIKELIHOOD  
OF LIABILITY FOR A MAJORITY OF THE DIRECTORS.

IT'S NOT A CRIMINAL CASE. IT'S NOT A CIVIL RIGHTS  
CASE. IT'S NOT CONLEY VERSUS GIBSON. IT IS AN EXTREMELY  
STRINGENT STANDARD FOR GOOD REASON. BECAUSE IT'S ORACLE'S  
CLAIM. AND THE SHAREHOLDER IS SAYING:

"WE DON'T CARE IF ORACLE HAS A MILLION  
SHAREHOLDERS. WE'RE GOING TO TAKE OVER FOR ORACLE  
AND BRING THIS CLAIM."

SO IT'S A VERY HIGH STANDARD. WHAT THE PLAINTIFFS DO  
IS THEY SAY:

"HIGH STANDARD? I KNOW WHAT WE WILL DO? WE  
WILL ALLEGE SOMETHING REALLY PRETTY BOLD. WE'RE GOING  
TO SAY THAT EVERY ONE OF THESE DIRECTORS FOR A DECADE  
NO MATTER WHEN THEY JOINED, EVERY SINGLE ONE OF THEM  
INTENTIONALLY PARTICIPATED IN DEFRAUDING THE UNITED  
STATES OF AMERICA."

THAT'S WHAT THEY SAY. THEY ARE NOT BASHFUL ABOUT IT.

"EVERY ONE OF THEM KNEW ABOUT IT AND DEFRAUDED  
THE U.S. KNEW ABOUT IT, PARTICIPATED AND APPROVED  
IT."

1 THAT'S WHAT THEY SAY.

2 **THE COURT:** NOW, THE NATURE OF THEIR AVERMENTS, THERE  
3 IS A DISTINCTION IN MY MIND TO -- AND I'M NOT EXPECTING YOU TO  
4 SAY:

5 "OH, THAT'S RIGHT."

6 BUT THERE IS A DISTINCTION BETWEEN THE INSIDE  
7 DIRECTORS AND THE OUTSIDE DIRECTORS, BECAUSE AS I UNDERSTAND THE  
8 PLAINTIFFS' AVERMENTS HERE THEY ARE SAYING, AT LEAST WITH  
9 RESPECT TO THE INSIDE DIRECTORS, THAT THE NATURE OF THE JOBS  
10 THAT THE INSIDE DIRECTORS HELD, EXCEPTING FOR PURPOSES OF  
11 ARGUMENT THEIR ALLEGATION THAT THERE WAS THIS VERY SUBSTANTIAL  
12 SCHEME TO DEFRAUD THE GOVERNMENT, THAT BY DEFINITION THEY WOULD  
13 KNOW OF THAT SCHEME BECAUSE OF THE NATURE OF WHAT THEY DID  
14 WITHIN THE COMPANY.

15 AND THE OUTSIDE DIRECTORS, THEIR DAY-TO-DAY  
16 MANAGEMENT IS -- THEY DON'T HAVE DAY-TO-DAY MANAGEMENT  
17 RESPONSIBILITIES, SO I DON'T THINK THAT ARGUMENT FLIES.

18 BUT I SUPPOSE MY QUESTION TO YOU IS: DO YOU AT LEAST  
19 SEE SOME DIFFERENCE IN ANALYSIS WITH RESPECT TO HOW THEY HAVE  
20 ALLEGED THIS, WHEN WE'RE TALKING ABOUT THE INSIDE DIRECTORS AND  
21 THE OUTSIDE DIRECTORS.

22 **MR. ETH:** I SEE NO DIFFERENCE IN CONCLUSION. THEY ARE  
23 DIFFERENTLY SITUATED, BUT AS TO THE INSIDE DIRECTORS THEY DON'T  
24 ALLEGE ANYTHING, EITHER.

25 NOW, WHAT THEY DO SAY IS:



1 "WELL, OVER TEN YEARS, BILLION DOLLARS IN  
2 SALES," 1 PERCENT OF ORACLE'S SALES DURING THAT  
3 PERIOD. BUT THEY STILL DON'T COME CLOSE TO SHOWING THAT ANY OF  
4 THE INSIDE DIRECTORS INTENTIONALLY DEFRAUDED THE UNITED STATES  
5 OF AMERICA. THEY DON'T COME CLOSE TO IT INSIDE OR OUTSIDE.

6 I AGREE THEY ARE DIFFERENTLY SITUATED, BUT NOT IN ANY  
7 RELEVANT WAY HERE. WHAT THEY DO --

8 **THE COURT:** WELL, I GUESS WHAT I'M SAYING IS THE  
9 NATURE OF THEIR ALLEGATIONS, I THINK YOU HAVE TO GIVE THEM  
10 CREDIT FOR THOSE ALLEGATIONS BEING A BIT MORE SUBTLE THAN THAT.

11 I MEAN, WHAT THEY ARE -- IF YOU POSIT THE NOTION THAT  
12 THERE IS THIS SCHEME -- AND I KNOW YOU FUNDAMENTALLY DISAGREE  
13 THAT THERE IS A SCHEME. BUT IF THERE IS, INDEED, A SCHEME ON THE  
14 MAGNITUDE THAT THEY ALLEGE, SOMEONE, FOR EXAMPLE, WHO IS THE  
15 CHIEF FINANCIAL OFFICER OF THE COMPANY WOULD KNOW, WOULD HAVE TO  
16 KNOW THAT IT WAS GOING ON.

17 YOU SAY IT WASN'T GOING ON. BUT IF, IN FACT, THEY  
18 ARE RIGHT -- AND I HAVE TO ACCEPT, YOU KNOW, THEIR AVERMENTS  
19 THAT THERE WAS AN EXTENSIVE SCHEME -- PUTTING, AGAIN, ASIDE  
20 WHETHER OR NOT IT'S PARTICULAR ENOUGH, THE NATURE OF THE JOB OF  
21 THE CHIEF FINANCIAL OFFICER OR CHIEF EXECUTIVE OFFICER WOULD BE  
22 THAT THEY WOULD HAVE TO KNOW.

23 **MR. ETH:** WE DISAGREE, YOUR HONOR.

24 **THE COURT:** OKAY.

25 **MR. ETH:** AND HERE'S WHY. THIS IS A SCHEME,

1 SUPPOSEDLY, RIGHT? THAT INVOLVES 27 DIFFERENT FEDERAL AGENCIES,  
2 ACCORDING TO THE UNDERLYING COMPLAINT. FOR SOME REASON  
3 PLAINTIFFS ONLY ALLEGE 21. MULTIPLE FEDERAL AGENCIES, MULTIPLE  
4 YEARS, MULTIPLE CONTRACTS, HUNDREDS OF PRODUCTS, DIFFERENT KINDS  
5 OF BASES OF AWARD, DIFFERENT KINDS OF -- YOU KNOW, ARE THESE  
6 CONTINUATIONS OF PREVIOUS DISCOUNTS? ARE THESE OVER \$200,000 OR  
7 NOT?

8 EXTREMELY INTRICATE. THIS ISN'T A QUESTION OF: DOES  
9 OUR SOFTWARE WORK, OR SOMETHING LIKE THAT. THIS IS AN EXTREMELY  
10 INTRICATE QUESTION.

11 IS IT A 27 PERCENT DISCOUNT, OR SHOULD IT BE 31  
12 PERCENT?

13 WELL, WHO ARE WE COMPARING IT TO? WHAT DID WE DO  
14 LAST WEEK? WHAT ARE WE DOING NEXT WEEK?

15 IS THIS SOMETHING WHERE WE CAN CONTINUE A REBATE FROM  
16 THE PRIOR QUARTER? OR IS IT 92 DAYS, OR IS IT 89 DAYS?

17 IT'S AT A LEVEL OF DETAIL TO EXPECT THE CEO OF A  
18 COMPANY WHERE THIS IS 1 PERCENT OF THEIR SALES TO SAY:

19 "AHA, I CAN TELL THAT WE MUST BE DEFRAUDING THE  
20 GOVERNMENT."

21 **THE COURT:** WELL, BUT IF, IN FACT, THE PLAINTIFFS  
22 ARE -- AND ACCEPTING THEIR AVERMENTS, I THINK THE NUMBER IS  
23 SOMETHING IN THE NEIGHBORHOOD OF \$1.8 BILLION. THAT'S NOT AN  
24 INCONSEQUENTIAL AMOUNT, EVEN TO THE MOST MASSIVE OF CORPORATE  
25 ENTITIES.

1                   **MR. ETH:** ABSOLUTELY. IT'S 1 BILLION, AND YOU'RE  
2 RIGHT. IT'S 1 BILLION OVER TEN YEARS. AND THIS IS A COMPANY  
3 OVER THAT TEN-YEAR PERIOD HAD NORTH OF 90 BILLION IN SALES.

4                   **THE COURT:** RIGHT.

5                   **MR. ETH:** SO THEY HAVE ALL KINDS OF DIFFERENT ISSUES  
6 ALL OVER THE WORLD INVOLVING ALL KINDS OF THINGS. AND THIS IS  
7 NOT SOMETHING THAT ON ITS FACE JUMPS OUT.

8                   IT'S AN INTRICATE SET OF DETAIL.

9                   **THE COURT:** LET ME GO BACK, THOUGH, FOR A MOMENT,  
10 BECAUSE WE'RE SORT OF OFF ON AN AREA THAT WE WILL GET TO, BUT  
11 WASN'T WHAT I WAS GOING AT.

12                   AND IT'S ACTUALLY SOMETHING I THINK YOU WILL PROBABLY  
13 AGREE WITH ME ON. FOR PURPOSES OF THE DEMAND FUTILITY ISSUE, YOU  
14 NEED MORE THAN JUST THE INSIDE DIRECTORS. SO IF, INDEED, THE  
15 OUTSIDE DIRECTORS ARE -- THERE IS AN INADEQUATE SHOWING THAT  
16 THERE WOULD BE ANY REASON OR ANY BASIS FROM THE AVERMENTS THAT  
17 WE HAVE NOW TO BELIEVE THAT THEY HAD ANY KNOWLEDGE -- AND I  
18 BELIEVE IT'S IF THERE ARE SIX; ISN'T THAT RIGHT?

19                   **MR. ETH:** THEY HAVE TO SHOW THAT THERE ARE SIX OF  
20 THEM.

21                   **THE COURT:** WHO ARE TAINTED, IF YOU WILL.

22                   **MR. ETH:** THAT'S RIGHT. ABSOLUTELY.

23                   **THE COURT:** SO TO THE EXTENT THAT WE CAN ARGUE AND  
24 DISCUSS THE INSIDERS, BUT FOR PURPOSES OF THE DEMAND FUTILITY  
25 ANALYSIS I'M NOT SURE THAT IS OF PARTICULAR -- THAT'S NOT GOING

1 TO BE THE MAKE OR BREAK.

2 **MR. ETH:** YOUR HONOR, YOU ARE ABSOLUTELY RIGHT. WHEN  
3 YOU HAD BROUGHT UP THE INSIDE DIRECTORS I COULD HAVE SAID:

4 "WE DON'T NEED THEM. LET'S PUT THEM TO THE  
5 SIDE. THERE ARE EIGHT OUTSIDE DIRECTORS. WE'RE  
6 DONE."

7 I COULD HAVE SAID THAT. BUT I BELIEVE THAT AS TO ALL  
8 OF THEM, AS TO ALL OF THEM THEY HAVEN'T PLEADED ENOUGH.

9 BUT YOU ARE ABSOLUTELY RIGHT. WE GET TO THE OUTSIDE  
10 DIRECTORS, AND THAT'S ALL WE NEED IS THE OUTSIDE DIRECTORS.

11 AND THERE THERE'S NOTHING BY THEIR POSITION. WHAT THE  
12 PLAINTIFFS SAY IS:

13 "WELL, YOU WERE ON AN AUDIT COMMITTEE."

14 WELL, CASE AFTER CASES THAT DOESN'T MEAN ANYTHING.

15 WHAT THE PLAINTIFFS ESSENTIALLY ALLEGE AS TO EVERY  
16 SINGLE ONE OF THESE DIRECTORS, WHETHER OR NOT THEY EVER WORKED  
17 FOR ORACLE, OUTSIDE DIRECTORS, WHEN THEY JOINED. TWO THINGS:  
18 ONE IS:

19 "WELL, YOU KNEW THAT THERE WERE OTHER COMPANIES  
20 THAT HAD THESE PROBLEMS."

21 IN FACT, COUNSEL, MINUTES BEFORE THIS HEARING -- NOT  
22 TWO HOURS AGO -- LIKE FIVE MINUTES AGO HANDED ME A CHRONOLOGY  
23 THAT I GUESS HE'S GOING TO USE. AND IT'S ALL ABOUT OTHER  
24 COMPANIES.

25 IT'S ABOUT PEOPLESOFT AND ACCENTURE, HEWLETT-PACKARD.

1 IT'S ABOUT SUN MICROSYSTEMS. AND THE ALLEGATION IS:

2 "WELL, YOU KNEW AT OTHER COMPANIES, SOME OF  
3 WHICH YOU ULTIMATELY ACQUIRED, HAD PROBLEMS WITH THE  
4 FCA. YOU KNEW THAT TECHNOLOGY COMPANIES HAD  
5 PROBLEMS. YOU'RE A TECHNOLOGY COMPANY. THEREFORE" --  
6 THEREFORE WHAT? THEREFORE --

7 **THE COURT:** YOU THINK THAT -- SO YOU DON'T THINK  
8 THERE'S ANY NOTION, THEN, THAT A DIRECTOR EXERCISING HIS OR HER  
9 FIDUCIARY OBLIGATIONS TO THE COMPANY IN LIGHT OF LEARNING OF  
10 THIS OUT IN THE MARKETPLACE, THEY DON'T HAVE ANY OBLIGATION OR  
11 DUTY TO INQUIRE?

12 **MR. ETH:** WHAT I'M SAYING IS WHAT THE PLAINTIFFS HAVE  
13 TO SHOW IS THAT THESE DIRECTORS KNEW OR MUST HAVE KNOWN. THAT'S  
14 WHAT THEY HAVE TO SHOW.

15 AND THE IDEA THAT YOU CAN PICK OTHER COMPANIES, OTHER  
16 COMPANIES AND SAY:

17 'WELL, THAT MEANS THAT YOU KNEW THAT THERE WAS  
18 SOMETHING GOING ON AT ORACLE THAT CREATES A  
19 SUBSTANTIAL LIKELIHOOD OF LIABILITY" HAS BEEN  
20 REJECTED OVER AND OVER AGAIN. THAT'S NOT THE WAY IT WORKS.

21 AND, YOUR HONOR, I THINK BACK TO THE BACKDATING  
22 CASES. COURTS LOOKED CASE-BY-CASE, INDIVIDUAL-BY-INDIVIDUAL.  
23 NOT:

24 "WELL, THERE'S SOMETHING OUT THERE SOMEWHERE.  
25 THEREFORE, YOU KNEW."

1           THERE ARE A LOT OF THINGS THAT THEY ARE ON NOTICE OF  
2           THAT COULD BE A PROBLEM. THEY ARE ON NOTICE OF EMPLOYMENT  
3           REGULATIONS, ENVIRONMENTAL REGULATIONS, SECURITIES REGULATIONS.

4           THE FACT THAT OTHER COMPANIES HAD THIS DOESN'T  
5           SATISFY IT, AND THEY DON'T CITE A CASE WHERE IT DOES.

6           SO THAT'S ONE MAIN THING THEY RELY ON. THE OTHER  
7           THING THEY RELY ON IS THEY SAY ALL OF THESE DIRECTORS THROUGHOUT  
8           THIS ENTIRE PERIOD HAD ACCESS TO DOCUMENTS, CONVERSATIONS, THEY  
9           ATTENDED MEETINGS, THEY KNEW PEOPLE AND SO ON.

10          WELL, OF COURSE THEY DID. EVERY PERSON IN THE WORLD,  
11          EVERY DIRECTOR IN THE WORLD, THEY ALL HAVE ACCESS, GENERALIZED,  
12          TO ALL KINDS OF THINGS. BUT WHAT THEY DON'T EVER SAY IS WHAT  
13          DOCUMENT, WHEN, APPRISED WHICH DIRECTOR OF WHAT?

14          INSTEAD:

15                 "WELL, YOU HAD A SALES DATABASE."

16          WELL, THAT SHOULDN'T BE SURPRISING THAT THE COMPANY  
17          WOULD KNOW WHAT ITS SALES ARE. AND I SEE IT ON THE CHRONOLOGY  
18          HERE: WELL, THEY INSTALLED A SALES DATABASE.

19          I HOPE SO. I MEAN, IT WOULD BE KIND OF SHOCKING IF  
20          THEY DIDN'T HAVE A DATABASE THAT TELLS THEM HOW THEY ARE DOING,  
21          TRACKING HOW THEY ARE DOING.

22          THEY, OF COURSE, DON'T EVER ALLEGE WITH ANY  
23          PARTICULARITY THAT ANY OUTSIDE DIRECTOR EVER CONSULTED IT,  
24          LOOKED AT IT, THOUGHT ABOUT IT, AND THAT IT REVEALED ANYTHING ON  
25          ANY PARTICULAR DAY, WEEK, MONTH, YEAR OR DECADE.

1 SO IT'S JUST COMPLETELY EMPTY. AND WHEN YOU LOOK AT  
2 THE CASES THEY DO CITE, THERE ARE A COUPLE. THEY CITE -- THEIR  
3 LEADING CASE IS THE ABBOTT CASE FROM THE SEVENTH CIRCUIT. IT'S  
4 SO COMPLETELY DIFFERENT IN WHAT THEY -- IN WHAT THEY ALLEGE.

5 THEY HAVE CERTIFIED LETTERS GOING DIRECTLY TO  
6 DIRECTORS. THREE OF THEM GO DIRECTLY TO THE DIRECTORS. YOU HAVE  
7 STOCK DECLINES IN RESPONSE TO ARTICLES. YOU HAVE SEC FORMS THAT  
8 ACKNOWLEDGE A PROBLEM. YOU HAVE VOLUNTARY COMPLIANCE PROGRAMS.  
9 YOU HAVE THE DIRECTORS LEARNING EXACTLY WHAT IS GOING ON.

10 AND THE COURT SAID THERE WAS AN EXTENSIVE PAPER TRAIL  
11 LINKING THE DIRECTORS, DIRECT KNOWLEDGE FOR THE DIRECTORS.

12 THE OTHER CASE THEY CITE, THE MCCALL CASE, SAME KIND  
13 OF THING. AUDIT REPORTS THAT HAVE SPECIFIC INFORMATION,  
14 STATISTICAL ANALYSIS, SECRET RESERVE REPORTS, RAIDS IN SIX  
15 STATES, 35 FACILITIES, SEARCH WARRANTS ISSUED. IT'S COMPLETELY  
16 DIFFERENT FROM HERE WHERE IT'S:

17 "WELL, YOU HAD ACCESS TO DOCUMENTS. YOU  
18 ATTENDED BOARD MEETINGS."

19 OF COURSE THEY HAD ACCESS TO DOCUMENTS, ATTENDED  
20 BOARD MEETINGS. THERE'S NO SUBSTANCE TO ANY OF IT.

21 THE WAY YOU CAN TELL IS WHEN YOU LOOK AT THE CASES WE  
22 CITED, RECENT CASES FROM THE NORTHERN DISTRICT, THEY DON'T EVEN  
23 RESPOND.

24 NOTHING ON THE VERIFONE CASE, JUDGE PATEL. NOTHING  
25 ON THE VERISIGN CASE, JUDGE HAMILTON. JUST COMPLETELY SILENT ON

1 THE CITIGROUP CASE. ON ALL THESE CASES, NOTHING AT ALL. THEY  
2 HAVE GONE THROUGH ALL OF THESE DIFFERENT ARGUMENTS.

3 SO AND I'M FIGHTING TOO MUCH ON THE INSIDE DIRECTORS,  
4 BUT EVEN THERE ALL THEY HAVE ON THE INSIDE DIRECTORS IS THERE'S  
5 ONE E-MAIL THAT SAYS THE NAME SAFRA. WE SHOULD TALK TO SAFRA.  
6 NOT:

7 "WE SHOULD RUN THIS SCHEME BY SAFRA BECAUSE  
8 SHE'S DONE THIS BEFORE." WE SHOULD TALK TO SAFRA.  
9 ALL THEY HAVE FOR MR. ELLISON, THE CEO, IS THEY SAY:

10 "WELL THERE ARE E-MAILS FROM THE OFFICE OF THE  
11 CEO."

12 THE UNDERLYING COMPLAINT, WHICH THEY COPIED -- THEY  
13 DIDN'T COPY IT COMPLETELY -- IS A PARAGRAPH IN THE UNDERLYING  
14 COMPLAINT THAT SAYS WHO IS IN THAT OFFICE OF CEO AND WHO SIGNED  
15 THOSE VARIOUS E-MAILS.

16 IT'S ACTUALLY PARAGRAPH 21 OF THE UNDERLYING, THE  
17 FRASCELLA COMPLAINT. HERE IT'S PLAINTIFFS' 129. AND THEY LIST  
18 FOUR PEOPLE, AND THEY ARE JUST FOUR EMPLOYEES OF ORACLE. IT'S  
19 NOT MR. ELLISON. GOVERNMENT HASN'T CHARGED MR. ELLISON WITH  
20 ANYTHING, OR MS. CATZ, OR MR. HENLEY OR FOR ANYBODY ELSE.

21 SO WE AGREE WITH YOUR HONOR ABOUT THE OUTSIDE  
22 DIRECTORS. WE THINK IT GOES FURTHER TO THE INSIDE DIRECTORS, AS  
23 WELL.

24 **THE COURT:** NOW, I KNOW YOU ARGUE FOR DISMISSAL  
25 WITHOUT LEAVE TO AMEND, WHICH IS THE AGGRESSIVE APPROACH THAT



1 I'M NOT SURPRISED AT. BUT, I MEAN, ALL OF YOUR ARGUMENTS ARE  
2 ARGUMENTS THAT DON'T FORECLOSE THE NOTION THAT A COMPLAINT COULD  
3 BE BROUGHT.

4 IN OTHER WORDS, WE'RE NOT IN A SITUATION WHERE, YOU  
5 KNOW, SOMEBODY IS -- SOMEONE HAS TALKED ABOUT A DIRECTOR WHO  
6 SIMPLY WASN'T EVEN ON THE BOARD OR SOMETHING WHERE, AS A MATTER  
7 OF OUT OF THE BOX, YOU KNOW, THERE'S NO WAY IT COULD EVER BE  
8 CURED.

9 ISN'T THIS THE CASE THAT IF I DO GO YOUR WAY I SHOULD  
10 ALLOW AN OPPORTUNITY TO AMEND?

11 **MR. ETH:** YOUR HONOR, HERE'S WHY WE THINK IT SHOULD  
12 BE WITHOUT LEAVE TO AMEND. THERE IS A SECOND ISSUE WHICH IS  
13 CONTINUOUS TRADING AND CONTEMPORANEOUS TRAINING.

14 **THE COURT:** STANDING? STANDING?

15 **MR. ETH:** WELL, THEY ARE BOTH REALLY STANDING. IT'S  
16 ANOTHER WAY OF LOOKING AT STANDING. AND THE QUESTION IS WHETHER  
17 OR NOT THE PLAINTIFFS THEMSELVES HELD STOCK FROM THE BEGINNING  
18 THROUGH THE END.

19 **THE COURT:** RIGHT.

20 **MR. ETH:** AND WHAT THEY DO IS THEY SAY -- WHAT THE  
21 PLAINTIFFS DO IS THEY SAY:

22 "THEY HELD IT AT ALL RELEVANT TIMES."

23 THAT'S NOT ENOUGH. YOU HAVE TO SAY:

24 "I BOUGHT IT HERE AND HELD IT THROUGHOUT."

25 **THE COURT:** WHY COULDN'T THAT BE SUBJECT TO

1 AMENDMENT?

2 **MR. ETH:** WELL, AT THIS POINT THEY HAVEN'T SAID THEY  
3 CAN DO IT.

4 **THE COURT:** WELL --

5 **MR. ETH:** THEY CAN EITHER DO IT OR CAN'T. AND, I  
6 MEAN, MAYBE THAT'S RIGHT THERE. BUT THEY HAVEN'T DONE THAT, AND  
7 THAT'S SOMETHING THAT COULD RISE TO THAT LEVEL.

8 BUT BEYOND THAT, AND WHAT ACTUALLY IS MORE  
9 FUNDAMENTAL, HERE'S WHAT THE PLAINTIFFS HAVE DONE. THEY TOOK  
10 TWO INDIVIDUAL COMPLAINTS, PUT THEM TOGETHER AND AMENDED THEM.  
11 AND THEN, IN THEIR OPPOSITION BRIEF PUT IN ALL KINDS OF OTHER  
12 STUFF.

13 THAT SOUNDS LIKE A COUPLE OF AMENDMENTS TO ME RIGHT  
14 THERE.

15 **THE COURT:** WELL, THE CONSOLIDATION WAS A FUNCTION OF  
16 SOME RULINGS THAT WERE MADE BY ME, SO I WASN'T GIVING THEM LEAVE  
17 TO AMEND TO BRING NEW -- I HADN'T RULED ON THE SUBSTANCE OF THE  
18 COMPLAINT. THIS WAS A FUNCTION OF BRINGING ONE CASE INTO THIS  
19 COURT AND NOT MOVING ANOTHER CASE OUT AND ALL OF THAT AND  
20 RESULTING IN A CONSOLIDATED COMPLAINT, BUT --

21 **MR. ETH:** IT WAS ACTUALLY MORE THAN JUST PUTTING THE  
22 COMPLAINTS TOGETHER, BECAUSE WE ACTUALLY HAD A STIPULATION  
23 SAYING:

24 "IF ALL YOU'RE DOING IS PUTTING THE COMPLAINTS  
25 TOGETHER, WE WILL RESPOND IN SEVEN DAYS OR TEN DAYS,"

1       WHATEVER IT WAS.

2                   BUT THEY ADDED 50 PAGES TO THE COMPLAINT, OR 50  
3       PARAGRAPHS. I FORGOT IF IT WAS 50 PARAGRAPHS OR 50 PAGES. SO  
4       WE VIEW THAT AS AN AMENDMENT. WE VIEW THE VIRGINIA AS AN  
5       AMENDMENT.

6                   AND THESE ARE EXPERIENCED COUNSEL, AND THESE RULES  
7       ARE VERY WELL KNOWN. AND WE CITE TO -- WE'D LOOK AT THE SILICON  
8       GRAPHICS CASE, WHICH LOOKED AT THIS EXACT SAME ISSUE AND SAID IF  
9       THEY DON'T OFFER WHAT THEY WOULD ADD, AND IF THEY IN THEIR  
10      PAPERS HAD SAID:

11                   "WELL, HERE'S WHAT WE WANT TO ADD," BUT IT'S  
12      JUST -- WE ALREADY KNOW WHAT THEY WANT TO ADD. IT'S VIRGINIA.  
13      AND WHAT'S IN VIRGINIA, WE'VE LOOKED AT THAT. THAT JUST  
14      DEMONSTRATES THAT THERE'S NO TIE BETWEEN ANY DIRECTOR OUTSIDE OR  
15      INSIDE TO ANYTHING THAT WENT ON HERE.

16                   **THE COURT:** OKAY. LET ME ASK PLAINTIFFS ON THE DEMAND  
17      FUTILITY ISSUE, AND THEN WE WILL GO TO THE 12 (B) (6) INDIVIDUAL  
18      ISSUES, WHICH I KNOW DEMAND FUTILITY IS THE BIG QUESTION AND --  
19      BUT GO AHEAD.

20                   **MR. MOLUMPBY:** THANK YOU, YOUR HONOR. AND MR. ETH WAS  
21      CORRECT. WE DID PREPARE FOR ILLUSTRATIVE PURPOSES TO ASSIST THE  
22      COURT, BECAUSE IT'S NOT AN EASY ISSUE, A CHART INDICATING WHO  
23      THE DIRECTORS WERE AND A TIME LINE OF THE EVENTS, WHICH WE  
24      THOUGHT MIGHT BE HELPFUL.

25                   **THE COURT:** I'D BE HAPPY TO HAVE IT. THE DEFENSE IN

1 THEIR REPLY BRIEF HAD A CHART WITH RESPECT TO THE INDIVIDUAL  
2 DIRECTORS, SO I'M HAPPY TO HAVE YOUR CHART.

3 WHY DON'T YOU GIVE IT TO MY COURTROOM DEPUTY?

4 **MR. MOLUMPBY:** I ALSO HAVE SOME FOR YOUR STAFF, IF  
5 YOU LIKE.

6 **THE COURT:** GO AHEAD. WE WILL TAKE IT.

7 AND I RECOGNIZE MR. ETH GRABBED YOUR CHART IN ADVANCE  
8 AND TRIED TO USE IT, BUT I'M SURE YOU WILL --

9 **MR. MOLUMPBY:** AS ANY SKILLED ADVOCATE WOULD. I DON'T  
10 BLAME HIM FOR THAT.

11 LET ME START WITH THE FIRST QUESTION THAT YOUR HONOR  
12 ASKED, AND THAT'S: IS THE QUESTION BASICALLY WITH ALL THE CASES  
13 THAT HAVE INTERPRETED 23.1 IN DELAWARE AND FEDERAL COURTS  
14 THROUGHOUT THE COUNTRY, IS THE BASIC ISSUE: HAVE WE ALLEGED  
15 ENOUGH FACTS PRESUMED TO BE TRUE AND REASONABLE INFERENCES DRAWN  
16 FROM THOSE FACTS TO CREATE A REASONABLE DOUBT THAT THESE  
17 DIRECTOR DEFENDANTS KNEW WHAT WAS GOING ON?

18 WE AGREE THAT'S BASICALLY THE ISSUE HERE.

19 **THE COURT:** AND THE OPERATIVE WORD THAT YOU JUST USED  
20 IS -- YOUR CONTENTION IS THEY KNEW. IT'S NOT A CASE OF THEY  
21 SHOULD HAVE KNOWN OR BEING MORE DILIGENT THEY WOULD HAVE KNOWN.  
22 YOU'RE SAYING THEY KNEW.

23 **MR. MOLUMPBY:** CORRECT. AND OUR COMPLAINT ACTUALLY  
24 USES "KNEW OR RECKLESSLY SHOULD HAVE KNOWN." AND, FRANKLY, WE  
25 BELIEVE THAT IS STANDARD, AND THE ABBOTT CASE SAYS THAT.

1 BUT EVEN IF WE KNOW USED THE "KNOWING" STANDARD WE  
2 BELIEVE WE HAVE ALLEGED FACTS WHICH ANY REASONABLE PERSON  
3 CONSIDERING IT NOT IN ISOLATION, AS MR. ETH IS ASKING YOU TO  
4 CONSIDER ALL THESE FACTS, BUT TOGETHER, THE TOTALITY. YOUR  
5 HONOR USED THE TWOMBLY AND IQBAL REFERENCES EARLIER TODAY. WE  
6 WELCOME SUCH AN ANALYSIS, BECAUSE IN OUR VIEW CONSIDERING THE  
7 FACTS IN THEIR TOTALITY, THERE'S ONLY ONE PLAUSIBLE EXPLANATION  
8 HERE.

9 WE CAN GO BACK AND FORTH WITH MR. ETH ON WHETHER OR  
10 NOT THERE'S ENOUGH RED FLAGS, BUT I THINK AT THE END OF THE DAY  
11 THAT'S FOR A TRYER OF FACT TO DECIDE.

12 **THE COURT:** WELL, BUT DOESN'T -- ONE OF THE THINGS  
13 ABOUT YOUR POSITION THAT TROUBLES ME IS IF YOU -- IF YOU ALLEGE  
14 A MASSIVE ENOUGH SCHEME -- MASSIVE IN TERMS OF QUANTITY, AMOUNT,  
15 DURATION OR WHATEVER -- YOU ARE ESSENTIALLY WRITING OUT DEMAND  
16 FUTILITY. I MEAN, YOU'RE SAYING:

17 "IF IT'S BIG ENOUGH, THEN WE DON'T REALLY HAVE  
18 TO LOOK AT THE PARTICULARS OF WHETHER OR NOT DIRECTOR  
19 A WAS IN A POSITION TO KNOW THESE THINGS. IT'S JUST  
20 SO MASSIVE THAT WE DON'T HAVE TO WORRY ABOUT IT," IS  
21 MORE OR LESS HOW I HEAR YOUR ARGUMENT COMING OUT.

22 AND IF THAT'S TRUE, THEN THE DEMAND FUTILITY ISSUE  
23 REALLY GOES BY THE BOARDS IF YOU GET OVER A CERTAIN LEVEL OF  
24 MAGNITUDE OF THE SCHEME.

25 **MR. MOLUMPBY:** IF I SUGGESTED THAT IN THE PAPERS THAT

1 IS NOT MY ARGUMENT, BUT IT IS CLOSE TO THAT, YOUR HONOR. AND  
2 THAT'S BASED UPON NOT WHAT I THINK, BUT WHAT JUDGES APPLYING  
3 DELAWARE LAW HAVE SAID. FOR EXAMPLE, THE OXFORD CASE THAT WE  
4 CITED APPLYING DELAWARE LAW IN WHICH THE COURT HELD, QUOTE:

5 "WHERE LIABILITY IS BASED UPON A FAILURE TO  
6 SUPERVISE AND MONITOR AND TO KEEP ADEQUATE  
7 SUPERVISORY CONTROLS IN PLACE, DEMAND FUTILITY IS  
8 ORDINARILY FOUND, ESPECIALLY WHERE THE FAILURE  
9 INVOLVES A SCHEME OF SIGNIFICANT MAGNITUDE AND  
10 DURATION."

11 **THE COURT:** BUT THAT'S SORT OF TOUCHED ON INTERNAL  
12 CONTROL NOTION. ARE YOU ARGUING THAT ONE OF THE REASONS THAT  
13 THERE'S DEMAND FUTILITY HERE IS THAT SORT OF SECOND PART IN  
14 CAREMARK, THE EXCEPTION TO THE DIFFICULTY IN PROVING THESE  
15 CASES, AND THAT IS THERE IS INADEQUATE INTERNAL CONTROLS. I  
16 DON'T READ YOUR COMPLAINT AS SAYING THAT.

17 **MR. MOLUMPBY:** WE DON'T DO THAT. BUT WE DO CITE THE  
18 CASE FOR SAYING SIMPLY THAT THE DURATION AND THE MAGNITUDE OF  
19 THE ALLEGED FRAUD IS SOMETHING THAT THE COURT SHOULD CONSIDER.  
20 IN OUR VIEW, IT'S EVEN MORE IMPORTANT IN A CASE SUCH AS THIS. I  
21 MEAN, WE DIDN'T MAKE UP THE EXTENT OF --

22 **THE COURT:** WELL --

23 **MR. MOLUMPBY:** -- THIS FRAUD.

24 **THE COURT:** -- ENOUGH IN AND OF ITSELF.

25 **MR. MOLUMPBY:** NO, IT'S NOT. I THINK AT SOME POINT

1 WE HAVE TO COME TO YOU AND SHOW WHY IT WAS THAT THE BOARD AND  
2 THE EXECUTIVE OFFICERS KNEW WHAT WAS GOING ON. AND WE THINK  
3 THAT'S PART AND PARCEL OF THE SAME ANALYSIS.

4 MR. ETH SAID:

5 "WELL, IT'S JUST ONE CONTRACT. IT'S JUST \$1  
6 BILLION."

7 WELL, THE GOVERNMENT CONTRACT THAT ORACLE ENTERED  
8 INTO IN 1998 WAS THE LARGEST CONTRACT AT ORACLE, THE LARGEST.

9 IT WAS ALSO THE MOST IMPORTANT. WHY? UNDER THE  
10 CONTRACT, IF THEY WERE GOING TO CHARGE ANY OTHER NONGOVERNMENT  
11 CUSTOMER A CERTAIN PRICE, A COMMERCIAL CUSTOMER, THEY HAD TO  
12 PASS ALONG THAT SAME DISCOUNT ON THAT PRICE TO THE GOVERNMENT.

13 SO IT REQUIRED EVERY SINGLE OTHER ONE OF THESE \$89  
14 BILLION WORTH OF CONTRACTS TO BE CONSIDERED FOR PURPOSES OF THE  
15 GOVERNMENT CONTRACT. THAT'S WHY IT'S SO IMPORTANT. AND THAT'S  
16 WHY IT'S ALLEGED IN OUR COMPLAINT WITHIN A YEAR AFTER THEY  
17 SIGNED THIS CONTRACT THEY BROUGHT THE INTERNAL CONTROL PROCESS  
18 FOR MONITORING SALES, AND SPECIFICALLY DISCOUNTS ENTERED BY  
19 SALES FORCE, INSIDE, INTERNALLY TO THE OFFICE OF THE CEO.

20 IT WASN'T THERE BEFORE. AND THAT'S ATTESTED TO BY THE  
21 WHISTLEBLOWER AND ALSO IN THE GOVERNMENT COMPLAINT FILED IN  
22 VIRGINIA. IT'S NOT SOMETHING THAT WE'RE JUST MAKING UP OUT OF  
23 WHOLE CLOTH.

24 **THE COURT:** WHAT TIES THE OUTSIDE DIRECTORS TO THAT?

25 **MR. MOLUMPBY:** THE DIRECTORS, FIRST OF ALL IN OUR

1 CHART, WHAT WE TRIED TO DO ON THE LAST PAGE OF THE CHART IS TO  
2 IDENTIFY THE LENGTH OF THEIR TENURE ON THE BOARD -- THIS IS NOT  
3 A TRANSITORY BOARD BY ANY MEANS -- WITH THE ALLEGATIONS IN OUR  
4 COMPLAINT.

5 AND WHAT WE'VE TRIED TO ESTABLISH OR SHOW GRAPHICALLY  
6 WAS THESE DIRECTORS, A MAJORITY OF THE DIRECTORS WERE ON THE  
7 BOARD FOR A LONG TIME AT ORACLE, A LONG, LONG TIME, AND  
8 CERTAINLY DURING MOST OF THE EVENTS IN QUESTION, IF NOT ALL OF  
9 THEM.

10 THREE OF THE DIRECTORS WERE ON THE AUDIT AND FINANCE  
11 COMMITTEE. NOT JUST FOR A YEAR OR TWO, THEY WERE ON THE FINANCE  
12 AND AUDIT COMMITTEE DURING THE ENTIRE PERIOD, THE ENTIRE PERIOD.

13 PART OF THE DUTIES OF THE AUDIT COMMITTEE WAS TO MEET  
14 WITH GENERAL COUNSEL AND DISCUSS COMPLIANCE WITH THE REGULATORY  
15 FRAMEWORKS AND CONTRACTS.

16 ORACLE'S CODE OF GOVERNANCE EACH DIRECTOR WAS  
17 REQUIRED TO SIGN OFF ON REQUIRED THE DIRECTORS TO MONITOR  
18 COMPLIANCE WITH GOVERNMENT CONTRACTS.

19 JUST AS IN ABBOTT -- NOW, MR. ETH -- I'M FINE  
20 SUBMITTING THIS CASE ON THE ABBOTT CASE, YOUR HONOR.

21 JUST AS IN ABBOTT, THE COURT FOUND THAT BECAUSE AUDIT  
22 COMMITTEE MEMBERS PURSUANT TO THEIR CHARTER OF THE AUDIT  
23 COMMITTEE WERE RESPONSIBLE FOR DISCUSSING FINANCE AND AUDIT  
24 MATTERS WITH OUTSIDE ADVISORS. THEY WERE DEEMED, THE INFERENCE  
25 WAS DRAWN BASED UPON THE ALLEGATION THAT THEY KNEW. NOT BASED



1 UPON LETTERS THAT MR. ETH SAYS WAS SENT TO THE DIRECTORS.

2 IF YOU READ ABBOTT, ACTUALLY THE FOUR LETTERS THAT  
3 CAME FROM THE FDA WENT TO THE CEO WHO HAPPENED TO BE THE  
4 CHAIRMAN OF THE BOARD. THEY WERE NOT SENT TO THE FULL BOARD.

5 THE REASON THE DEMAND FUTILITY PASSED IN ABBOTT WAS  
6 BECAUSE THE COURT FOUND THAT THE AUDIT COMMITTEE MEMBERS WERE  
7 DEEMED TO HAVE THAT INFORMATION. THE INFERENCE WAS DRAWN BECAUSE  
8 THAT'S WHAT THE CHARTER REQUIRED THEM TO HAVE KNOWLEDGE OF.

9 VERY IMPORTANT DISTINCTION.

10 **THE COURT:** ISN'T MR. ETH'S POINT HERE, WHEN WE'RE  
11 LOOKING AT YOUR CHRONOLOGY, IS A LOT OF NEFARIOUS THINGS ARE  
12 HAPPENING OUT THERE IN THE WORLD, IT LOOKS LIKE? BUT DOESN'T  
13 THIS BOIL DOWN TO THE NOTION THAT YOUR POSITION IS DEPENDENT ON  
14 THE IDEA THAT ALL OF THESE THINGS THAT ARE HAPPENING WHILE THE  
15 OUTSIDE DIRECTORS ARE SERVING ON THE BOARD EFFECTIVELY PUTS THEM  
16 ON SOME KIND OF INQUIRY NOTICE. THAT THEY HAVE TO --

17 **MR. MOLUMPHY:** WELL --

18 **THE COURT:** AND IF THEY FAIL TO DO SO, YOU HAVE THEN  
19 ESTABLISHED THAT THEY ARE TAINTED FOR PURPOSES OF DEMAND  
20 FUTILITY. AND IS THAT WHAT THE LAW SAYS?

21 **MR. MOLUMPHY:** WELL --

22 **THE COURT:** DOESN'T THE LAW SAY THERE'S SOMETHING  
23 MORE THAN THAT? THERE HAS TO BE AN ACTUAL INDICATION. THERE  
24 HAS TO BE SOME FACTS AVERRED THAT SHOW NOT JUST THAT THEY SHOULD  
25 HAVE ASKED SOME QUESTIONS, BUT THAT THEY HAD KNOWLEDGE.

1 AND ALL THEY HAVE KNOWLEDGE OF IN YOUR CHRONOLOGY IS  
2 THEY ARE LIVING THROUGH A PERIOD OF TIME WHEN A LOT OF THINGS  
3 ARE HAPPENING OUT THERE THAT A VERY DILIGENT DIRECTOR MIGHT SAY:

4 "HEY, BY THE WAY, ARE WE -- YOU KNOW, I'VE READ  
5 THIS IN THE NEWSPAPER ABOUT ANOTHER COMPANY. AND  
6 WHAT ARE WE DOING ABOUT THAT TO MAKE SURE THAT WE'RE  
7 NOT FALLING AFOUL OF THIS?"

8 AND IS THAT WHAT THE LAW OF DEMAND FUTILITY REQUIRES?

9 **MR. MOLUMPBY:** NO, THE LAW DOESN'T REQUIRE JUST THAT.  
10 AND, MORE IMPORTANTLY, I DO NOT CHARACTERIZE OUR COMPLAINT AS  
11 MERELY ALLEGING THAT. I THINK WE GO FAR, FAR BEYOND THAT.

12 LET ME GIVE YOU SOME RED FLAGS THAT ARE IN OUR  
13 COMPLAINT THAT WE BELIEVE ARE RELEVANT.

14 THE FACT THAT THIS IS A GOVERNMENT CONTRACT, THE  
15 LARGEST CUSTOMER AT ORACLE. UNDER THE CONTRACT AND UNDER THE  
16 MAS RULES, THEY ARE CONTRACTUALLY REQUIRED TO MONITOR THEIR  
17 SALES TO MAKE SURE THAT THEY ARE COMPLYING WITH THIS PRICE  
18 REDUCTION CLAUSE. THAT'S A STARTING POINT.

19 **THE COURT:** WELL, LET ME STOP YOU THERE. IF A BOARD  
20 MEMBER DOESN'T ACT IN CONFORMITY WITH THE REQUIREMENTS THAT --  
21 LET'S TAKE A LAZY BOARD MEMBER. LET'S JUST ASSUME A VERY LAZY  
22 BOARD MEMBER. FOR DEMAND FUTILITY PURPOSES, IS THAT ENOUGH? IS  
23 THAT ENOUGH TO ESSENTIALLY SAY:

24 "THIS PERSON IS EFFECTIVELY" -- I'LL USE THE  
25 WORD "TAINT." AND YOU KNOW WHAT I MEAN BY THAT: A DIRECTOR WHO

1 IS NOT DISINTERESTED AND INDEPENDENT.

2 CAN THE REASON FOR THAT BE THEY ARE SO LAZY WE CAN  
3 ASSUME THEY ARE DISINTERESTED OR THEY ARE NOT DISINTERESTED AND  
4 THEY ARE NOT INDEPENDENT?

5 **MR. MOLUMPBY:** I THINK A SHORT ANSWER IS AT SOME  
6 POINT: YES, ABSOLUTELY. IF AT SOME POINT THEY ABDICATE THEIR  
7 FIDUCIARY DUTIES TO THE CORPORATION OR ARE RECKLESS --

8 **THE COURT:** WHAT'S THE CASE AUTHORITY THAT SAYS:

9 "OKAY, THIS DIRECTOR DIDN'T -- WE'RE NOT SAYING  
10 THIS DIRECTOR HAD KNOWLEDGE."

11 IN FACT, THE DIRECTOR WAS TOO LAZY TO HAVE KNOWLEDGE.

12 HE OR SHE WAS PAYING NO ATTENTION. YOU'RE SAYING  
13 THAT'S TANTAMOUNT TO A DIRECTOR THAT CANNOT THEN ASSUME THEIR  
14 DUTY WHEN A DEMAND IS MADE TO THEM AS TO WHETHER OR NOT TO  
15 ASSUME A CASE TO TAKE ON THE CORPORATION'S BEHALF. AND I'M NOT  
16 SURE ONE EQUATES TO THE OTHER.

17 **MR. MOLUMPBY:** YES, IF -- THAT RULE WOULD BE THE  
18 CAREMARK CASE. YOU BASICALLY CAN'T CLOSE YOUR EYES AND PUT YOUR  
19 HEAD IN THE SAND. YOU HAVE TO PUT IN PLACE A SYSTEM OF CONTROLS  
20 AND PROCESSES SO YOU KNOW WHAT IS GOING ON AT THE COMPANY.

21 **THE COURT:** THAT IS WHERE I'M ALSO HAVING TROUBLE  
22 WITH YOUR ARGUMENTS, BECAUSE I DON'T SEE YOU SAYING THERE ARE  
23 INADEQUATE CONTROLS AND SYSTEMS IN THIS CASE.

24 **MR. MOLUMPBY:** WE'RE NOT. LET ME BE CLEAR. THAT'S  
25 NOT OUR CASE.

1           **THE COURT:** SO THAT'S NOT THE PROBLEM WE HAVE IN THIS  
2 CASE.

3           **MR. MOLUMPHY:** CORRECT.

4           **THE COURT:** SO WE THEN GO BACK, DON'T WE, TO -- IT'S  
5 A STRUCTURE THAT YOU DON'T HAVE A PARTICULAR PROBLEM WITH. SO  
6 IN THAT INSTANCE DON'T YOU HAVE TO SHOW THAT THE DIRECTORS  
7 KNEW --

8           **MR. MOLUMPHY:** YES.

9           **THE COURT:** -- THAT THERE WAS A PROBLEM?

10          **MR. MOLUMPHY:** YES. BUT WE DON'T NEED AN ADMISSION  
11 FROM A DIRECTOR. WE DON'T NEED TO TAKE A DEPOSITION IN ANOTHER  
12 CASE WHERE HE SAID:

13                   "I KNEW THAT THAT WAS GOING ON, AND I LET IT GO  
14 ON, ANYWAY."

15                   THAT'S NOT WHAT THE LAW REQUIRES.

16          **THE COURT:** DON'T YOU NEED SOMETHING, FOR EXAMPLE,  
17 MATERIALS GOING TO THE BOARD THAT SAY SOMETHING THAT PUTS THEM  
18 ON NOTICE THAT THIS IS GOING ON?

19          **MR. MOLUMPHY:** WE BELIEVE WE HAVE ALLEGED THAT.

20          **THE COURT:** WHERE?

21          **MR. MOLUMPHY:** CONSISTENT WITH ABBOTT. JUST LIKE IN  
22 ABBOTT WHERE THE COURT INFERRED FROM THE TYPES OF INFORMATION  
23 THAT WAS SUBMITTED TO THE COMPANY, TO THE CEO, THE COURT  
24 INFERRED BASED UPON THE DUTIES OF AN AUDIT COMMITTEE MEMBER, FOR  
25 EXAMPLE, THE DUTIES OF A CODE OF CONDUCT, THAT IS SUFFICIENT TO

1 INFER THAT THAT DIRECTOR KNEW.

2 **THE COURT:** DOES AN AUDIT COMMITTEE HAVE THE  
3 RESPONSIBILITY TO REVIEW ALL MATERIALS GOING TO THE OFFICE OF  
4 THE CHIEF EXECUTIVE OFFICER?

5 **MR. MOLUMPBY:** NO, NOT NECESSARILY.

6 **THE COURT:** OKAY. WELL, THEN, WHY SHOULD WE INFER  
7 THAT SIMPLY BECAUSE SOMETHING GOES TO THE CEO, WHO AS THE INSIDE  
8 DIRECTOR MAY WELL BE -- YOU KNOW, YOU MAY HAVE AN ARGUMENT THERE  
9 WITH RESPECT TO THAT INDIVIDUAL. BUT WHY DO THE MEMBERS OF THE  
10 AUDIT COMMITTEE, WHO I THINK BY DEFINITION ARE OUTSIDERS, WHY  
11 WOULD THEY NECESSARILY BE CHARGED WITH THAT INFORMATION?

12 **MR. MOLUMPBY:** THEY ARE CHARGED WITH THE DUTY -- THEY  
13 ARE CHARGED WITH THE DUTIES THEY UNDERTAKE UNDER THEIR CHARTER.

14 **THE COURT:** YES.

15 **MR. MOLUMPBY:** CORRECT? AND IF THEY VOLUNTARILY  
16 AGREED TO UNDERTAKE THOSE DUTIES UNDER THE CHARTER, THEY ARE  
17 DUTY BOUND TO COMPLY WITH THOSE.

18 UNDER ORACLE'S AUDIT COMMITTEE CHARTER THEY ARE  
19 RESPONSIBLE FOR COMMUNICATING WITH OUTSIDE COUNSEL AND  
20 MONITORING COMPLIANCE WITH GOVERNMENT CONTRACTS.

21 UNDER THE CODE OF BUSINESS ETHICS -- EXCUSE ME --  
22 UNDER THE CODE OF BUSINESS CONDUCT AND ETHICS, WHICH WE'VE CITED  
23 IN OUR COMPLAINT, THEY SPECIFICALLY CALLED OUT:

24 "MONITOR COMPLIANCE WITH GOVERNMENTAL  
25 CONTRACTS."

1                   AND WHAT I'M TRYING TO SAY IS IN THIS CASE, YOU KNOW,  
2 WE'RE NOT JUST COMING OUT WITH SOMETHING OUT OF THE BLUE. THE  
3 U.S. GOVERNMENT FOLLOWING A WHITSLEBLOWER COMPLAINT IN THIS  
4 CASE, DID A THREE-YEAR INVESTIGATION, SENT THEIR OWN SUBPOENA --  
5 AND THAT'S THE SECOND PAGE, JUST AN EXAMPLE FROM THEIR  
6 COMPLAINT -- AND DETERMINED THAT THIS WAS A SYSTEMIC FRAUD.

7                   99 PERCENT OF THE NONGOVERNMENT CONTRACTS, FOR  
8 EXAMPLE, FOR A MILLION AND ABOVE VIOLATED THE DISCOUNT POLICIES.  
9 99 PERCENT.

10                  WELL, HOW DO YOU GET TO ALMOST A HUNDRED PERCENT OF  
11 THE CONTRACTS VIOLATING THE POLICY?

12                  **THE COURT:**   THESE ARE THE CLAIMS IN THE FRASCELLA  
13 LAWSUIT.

14                  **MR. MOLUMPBY:**   THESE ARE THE CLAIMS BY THE GOVERNMENT  
15 IN THE GOVERNMENT'S FIRST-AMENDED COMPLAINT FILED A MONTH OR SO  
16 AGO.

17                  **THE COURT:**   WHEN THEY ENTERED THE KETON (PHONETIC)  
18 CASE.

19                  **MR. MOLUMPBY:**   CORRECT.   AND AFTER THEY HAVE DONE A  
20 THREE-YEAR INVESTIGATION, INCLUDING AN ANALYSIS OF ALL OF  
21 ORACLE'S TRADE DATA.   NOW, I DON'T HAVE THAT DATA.   BUT, YOU  
22 KNOW, I HAVE A LOT OF RESPECT FOR THE U.S. ATTORNEY'S OFFICE.  
23 AND USUALLY WHEN THEY SAY SOMETHING LIKE THAT THEY HAVE SOME  
24 SUPPORT TO BACK THAT UP.

25                  AND IF, IN FACT, THEY ARE RIGHT, IF, IN FACT, THE

1 MAGISTRATE JUDGE WHO LOOKED AT THE UNDERLYING DOCUMENTS AND THE  
2 CORRESPONDENCE WITH REED SMITH, ORACLE'S OUTSIDE COUNSEL, HE  
3 DECIDED THAT THERE WAS A PRIMA FACIE CASE OF A FRAUD HERE.

4 **THE COURT:** YES, I DID READ THAT. YOU ARE  
5 BOOTSTRAPPING AN AWFUL LOT FROM A DETERMINATION BY THE  
6 MAGISTRATE JUDGE IN THE EASTERN DISTRICTS OF VIRGINIA THAT THE  
7 CRIME FRAUD EXCEPTION HAS BEEN TRIGGERED. YOU'RE SORT OF MAKING  
8 THAT INTO SOME SORT OF DETERMINATION THAT THERE WAS FRAUDULENT  
9 CONDUCT.

10 I, HAVING DECIDED A LOT OF CRIME FRAUD ISSUES, DON'T  
11 THINK THAT IT GOES THAT FAR.

12 **MR. MOLUMPBY:** WELL, I THINK IT'S AN EXTRAORDINARY  
13 FINDING MYSELF, SOMETHING THAT JUST CAME DOWN. WE DON'T  
14 OBVIOUSLY HAVE THE UNDERLYING E-MAILS WITH REED SMITH. BUT  
15 HERE'S WHY IT'S IMPORTANT. AND THIS IS IN MY CHRONOLOGY.

16 2003 COMES ALONG. AND THIS IS RIGHT WHEN ORACLE IS  
17 RENEWING ITS GOVERNMENT SERVICES CONTRACT. WE KNOW FROM THE  
18 WHITSLEBLOWER COMPLAINT AND ALSO FROM THE GOVERNMENT COMPLAINT  
19 THAT THIS IS THE TIME IN WHICH SALES STAFF ARE RAISING  
20 QUESTIONS:

21 "IS WHAT WE'RE DOING COMPLIANT WITH THE  
22 GOVERNMENT SERVICES CONTRACT?"

23 ACCORDING TO MR. FRASCELLA, HE'S INSTRUCTED BY  
24 EXECUTIVES AT ORACLE:

25 "DON'T SAY ANYTHING. DON'T PUT ANYTHING IN

1           WRITING. WHITE OUT SALES CONTRACTS SO THE GOVERNMENT  
2           DOESN'T SEE THIS."

3           AT THE SAME TIME, AT THE SAME TIME, YOUR HONOR, THEY  
4   RETAIN REED SMITH.

5           NOW, THIS IS A BIG CORPORATION.

6           **THE COURT:** LET ME JUST STOP YOU FOR A MOMENT. WHAT I  
7   DON'T WANT TO LOSE SIGHT HERE OF WHEN WE ARE DISCUSSING THIS IS,  
8   THIS ISN'T A QUESTION OF WHETHER OR NOT -- I'M NOT HEARING A  
9   MOTION IN THE FRASCELLA CASE.

10          WHAT I'M HEARING IS WHETHER OR NOT IT IS FUTILE TO  
11   MAKE A DEMAND ON THIS BOARD --

12          **MR. MOLUMPHY:** CORRECT.

13          **THE COURT:** -- FOR ITS DETERMINATION ON WHETHER OR  
14   NOT ON BEHALF OF THE COMPANY A CASE SHOULD BE BROUGHT.

15          SO IT'S NOT WHETHER OR NOT SKULLDUGGERY OCCURRED IN  
16   THE CONTEXT OF THE FRASCELLA LAWSUIT. IT'S: DO YOU HAVE A BASIS  
17   FOR ME TO CONCLUDE THAT THERE'S NO CONFIDENCE THAT AN  
18   INDEPENDENT, DISINTERESTED GROUP OF INDIVIDUALS WHO ARE ON THE  
19   BOARD OF ORACLE, ARE THEY OR ARE THEY NOT DISINTERESTED AND  
20   INDEPENDENT SUCH THAT THEY CAN MAKE A DETERMINATION ON WHETHER  
21   OR NOT, YOU KNOW, THEY SHOULD PURSUE THE ACTION?

22          SO IT'S NOT, YOU KNOW -- A LOT OF THE ARGUMENT IS ALL  
23   THE TERRIBLE THINGS THAT WENT ON. AND PERHAPS YOU ARE RIGHT AND  
24   AT THE END OF THE DAY I DON'T KNOW WHAT IS GOING TO HAPPEN IN  
25   THE FRACELLA LAWSUIT.



1 BUT IT DOESN'T ANSWER THE QUESTION OF WHETHER OR NOT  
2 THIS BOARD IS IN A POSITION TO MAKE A CALL ON THIS ISSUE.

3 **MR. MOLUMPBY:** MAY I TRY TO DRAW THAT LINK?

4 **THE COURT:** YES, INDEED.

5 **MR. MOLUMPBY:** AND I APOLOGIZE THAT WE HAVE A LOT OF  
6 STUFF, BUT WE HAVE A LOT OF STUFF TO POINT THE COURT TO. BUT  
7 THE REASON IT'S IMPORTANT IS THE COURT STARTED ITS INQUIRY WITH:  
8 WHAT DO WE HAVE TO ESTABLISH THAT THE DIRECTORS, THE OUTSIDE  
9 DIRECTORS, KNEW WHAT WAS GOING ON; THAT THERE WAS THIS SO-CALLED  
10 SYSTEMIC FRAUD, AS THE MAGISTRATE JUDGE HELD IN FRASCELLA?

11 WELL, WHY ISN'T IT A RELEVANT FACT --

12 **THE COURT:** THE MAGISTRATE JUDGE HELD THAT THERE WAS  
13 PRIMA FACIE EVIDENCE SUFFICIENT TO TRIGGER THE CRIME FRAUD  
14 SECTION.

15 **MR. MOLUMPBY:** WELL --

16 **THE COURT:** THE MAGISTRATE JUDGE DID NOT FIND -- IT  
17 IS NOT A DETERMINATION ON THE MERITS. THAT'S A DISCOVERY MOTION.  
18 THAT IS NOT A MOTION THAT IS MAKING A FINDING OF -- IT'S NOT  
19 TANTAMOUNT TO A DETERMINATION THAT, YOU KNOW, THE FRASCELLA  
20 PLAINTIFFS WIN.

21 **MR. MOLUMPBY:** AGREED.

22 **THE COURT:** I'M JUST -- YOU KNOW, DON'T OVERARGUE THE  
23 MAGISTRATE JUDGE'S VERY SPECIFIC DETERMINATION ON DISCOVERY  
24 QUESTIONS AS TO WHAT IS GOING TO BE AVAILABLE TO BE DISCLOSED.

25 **MR. MOLUMPBY:** FAIR ENOUGH, YOUR HONOR. I GUESS MY

1 POINT WOULD BE IF IN 2003 A COMPANY LIKE ORACLE RETAINS OUTSIDE  
2 COUNSEL, REED SMITH, AND ACCORDING TO THE UNDERLYING FRASCELLA  
3 ALLEGATIONS THERE ARE HUNDREDS OF E-MAILS BACK AND FORTH WITHIN  
4 A YEAR PERIOD OF THEIR RENEGOTIATION F THIS CONTRACT. THERE  
5 THEN IS A WRITTEN POLICY SAYING:

6 "DIVERT ALL LARGE CONTRACTS TO RESELLERS SO THAT  
7 WE CAN AVOID THE GSA REPORTING REQUIREMENTS."

8 WHEREAS, REED SMITH OVER A PERIOD OF SIX YEARS, SIX  
9 YEARS, ACCORDING TO REED SMITH'S ANALYSIS THEY ARE ON SITE AT  
10 ORACLE TALKING WITH A SUBSTANTIAL TEAM OF ORACLE LEGAL, FINANCE,  
11 CONTRACTS, INFORMATION TECHNOLOGY AND INTERNAL AUDIT PERSONNEL.

12 TO ME, THAT IS A PIECE OF INFORMATION THAT THE COURT  
13 SHOULD CONSIDER IN DETERMINING WHETHER OR NOT AN OUTSIDE  
14 DIRECTOR KNEW WHAT WAS GOING ON. BECAUSE IF REED SMITH, AND  
15 THEN KPMG AND ERNST & YOUNG ARE BEING HIRED TO LITERALLY REVIEW  
16 ALL 1,700,000 CONTRACTS FOR THAT FIVE-YEAR PERIOD, AND THEY ARE  
17 DISCLOSING THAT TO THE JUDGE IN VIRGINIA AS IN ANTICIPATION OF  
18 LITIGATION, WELL, THAT TO ME IS A BIG RED FLAG.

19 TYPICALLY, WHEN YOU HIRE REED SMITH AND YOU HIRE  
20 OUTSIDE ACCOUNTANTS TO LOOK AT EVERY SINGLE ONE OF YOUR  
21 CONTRACTS IT'S BECAUSE THERE'S SOMETHING WRONG. THERE'S  
22 SOMETHING AMISS. WHY WOULDN'T THAT REASONABLE INFERENCE BE THAT  
23 THE BOARD WAS TOLD ABOUT THAT?

24 CERTAINLY, UNDER THE AUDIT COMMITTEE'S CHARTER THEY  
25 SHOULD HAVE KNOWN --

1                   **THE COURT:** I CERTAINLY HOPE A COMPANY'S HIRING  
2 OUTSIDE COUNSEL IS NOT -- ONE CAN INFER FROM THAT BASIC FACT  
3 THAT THE COMPANY HAS DONE SOMETHING ILLEGAL.

4                   I MEAN, IT'S JUST AS LIKELY, JUST AS FAIR AN  
5 INFERENCE THAT THE COMPANY IS ATTEMPTING TO FIND OUT WHAT THE  
6 CIRCUMSTANCES ARE AND TO HIRE OUTSIDE ACCOUNTANTS AND LAW FIRMS  
7 TO COME INTO PLAY. I MEAN, YOU'RE NOT HONESTLY SUGGESTING THAT  
8 HIRING AN OUTSIDE LAWYER IS AN INFERENCE THAT THE COMPANY HAS  
9 DONE SOMETHING WRONG.

10                  **MR. MOLUMPBY:** NO, BUT IT'S AN INFERENCE THAT THE  
11 BOARD KNOWS WHAT IS GOING ON, KNOWS THERE'S AN ISSUE, KNOWS  
12 THERE'S A RED FLAG.

13                  I MEAN, HAVING SEEN BOARD MINUTES, HAVING SEEN AUDIT  
14 COMMITTEE MINUTES, WHEN YOU HIRE AN OUTSIDE COUNSEL AND THEY  
15 PERFORM A SIX-YEAR ANALYSIS? AND WE NOW HAVE THE REPORT,  
16 120-PAGE REPORT. YOU KNOW THE DIRECTORS GOT THIS REPORT, YOUR  
17 HONOR.

18                  **THE COURT:** I AM NOT WITH YOU ON THE NOTION THAT IF  
19 YOU ARE A DIRECTOR IN THE COMPANY THAT THE HIRING OF OUTSIDE  
20 COUNSEL TRIGGERS YOUR KNOWLEDGE THAT THERE'S A PROBLEM WITHIN  
21 THE COMPANY, OR HIRING KPMG, OR WHOEVER ELSE, MEANS YOU, MR. AND  
22 MS. DIRECTOR, YOU NOW KNOW THERE'S A PROBLEM IN THE COMPANY.

23                  I DON'T THINK YOU CAN MAKE THAT INFERENCE.

24                  **MR. MOLUMPBY:** BY ITSELF MAYBE.

25                  **THE COURT:** AND, YOU KNOW, AGAIN, THE IDEA, THE FOCUS

1 IS THE LEVEL OF KNOWLEDGE THAT A DIRECTOR HAS SUCH THAT THAT  
2 DIRECTOR IS NO LONGER A DIRECTOR THAT CAN ACT WITH INDEPENDENCE  
3 AND APPROPRIATE DISINTEREST. THAT'S THE FOCUS.

4 AND YOU NEED SOMETHING SPECIFIC TO SAY THAT DIRECTOR  
5 X IS REMOVED FROM THE ROLE OF INDEPENDENT DIRECTOR. AND THAT'S  
6 WHAT I'M LOOKING FOR. AND I'M SEEING LOTS OF SMOKE, BUT I DON'T  
7 SEE ANY FIRE HERE.

8 **MR. MOLUMPBY:** WELL, WE SUBMIT THERE'S LOTS AND LOTS  
9 AND LOTS OF SMOKE. IT'S NOT YOUR ORDINARY CASE, BY ANY MEANS.  
10 BUT WE BELIEVE THE STANDARD IS: IS THERE A REASON TO DOUBT  
11 THEIR INDEPENDENCE?

12 **THE COURT:** THE INDEPENDENCE OF THESE DIRECTORS.

13 **MR. MOLUMPBY:** NOT WHETHER WE CAN PROVE THEIR LACK OF  
14 INDEPENDENCE. THAT'S NOT THE STANDARD UNDER DELAWARE LAW.  
15 WHETHER THE FACTS INTERPRETED IN OUR FAVOR, THE INFERENCES IN  
16 OUR FAVOR CAUSE A REASON TO DOUBT.

17 AND WE SUBMIT WHEN YOU HAVE THE LARGEST CONTRACT AT  
18 ORACLE, YOU HAVE WHISTLEBLOWERS SUPPOSEDLY BEING TOLD NOT TO PUT  
19 ANYTHING IN WRITING, WHEN YOU HAVE RETAINING OUTSIDE COUNSEL TO  
20 PERFORM A REVIEW OF EVERY SINGLE CONTRACT FOR COMPLIANCE WITH  
21 THE PRICE REDUCTION CLAUSE, WHEN YOU HAVE A FEDERAL MAGISTRATE  
22 JUDGE CONCLUDING A PRIMA FACIE CASE BASED UPON THE INFORMATION  
23 THAT THIS IS BASICALLY A WHITWASH -- THAT'S WHAT THE JUDGE SAID  
24 IN THAT ORDER.

25 **THE COURT:** I JUST -- WE BEG TO DIFFER ON THE IMPACT

1 OF THAT PARTICULAR ORDER.

2 **MR. MOLUMPBY:** OKAY. BUT, AGAIN, THAT'S JUST ONE.  
3 YOU ALSO HAVE THE WHISTLEBLOWER COMPLAINT IN A VERY RELATED CASE  
4 ON THIS EXACT SAME CONTRACT. THAT'S THE ORACLE UNIVERSITY CASE,  
5 SAME TIME PERIOD, TWO THOUSAND AND --

6 **THE COURT:** BUT YOU SEEM LIKE -- AND I'M NOT  
7 EXPECTING YOU TO AGREE WITH IT. BUT YOU ARE ENTITLED TO KNOW  
8 WHAT IS TROUBLING ME. NONE OF THIS IS IN MY MIND CONNECTING UP  
9 TO THE LEVEL OF KNOWLEDGE OF PARTICULAR DIRECTORS.

10 IT'S SAYING THAT ORACLE IS ENGAGED IN A LOT OF  
11 QUESTIONABLE CONDUCT THAT YOU THINK AMOUNTS TO A VERY VAST  
12 SCHEME. BUT WHAT YOU'RE NOT DOING IS CONNECTING THAT UP TO THE  
13 ROLE OF THESE DIRECTORS, PARTICULARLY THE OUTSIDE DIRECTORS, AS  
14 TO WHY ALL OF THIS MEANS THAT THEY ARE NOT IN A POSITION TO  
15 EXERCISE THEIR RESPONSIBILITY AS DIRECTORS OF THIS COMPANY,  
16 SHOULD THEY RECEIVE A DEMAND TO ENTER INTO THE FRAY AND BRING A  
17 CASE ON BEHALF OF THEIR -- OF THE COMPANY IN WHICH THEY HAVE  
18 THESE FIDUCIARY OBLIGATIONS.

19 AND IF YOU ARE RIGHT THAT YOU JUST ESTABLISH THAT  
20 THERE IS A SIGNIFICANT, MASSIVE FRAUD GOING ON, THEN RULE 23.1  
21 NEVER COMES INTO PLAY BECAUSE THEN YOU NEVER HAVE THE QUESTION  
22 OF DEMAND FUTILITY. IT'S JUST ALREADY BY DEFINITION ANSWERED,  
23 BECAUSE YOU'VE MAPPED OUT A MASSIVE FRAUD. AND A MASSIVE FRAUD  
24 OCCURRING WHILE THIS COLLECTION OF DIRECTORS IS IN PLACE MEANS  
25 THEY CAN'T BE DISINTERESTED.

1 AND THAT'S KIND OF HOW I HEAR YOUR ARGUMENT.

2 **MR. MOLUMPBY:** THAT'S NOT MY ARGUMENT.

3 **THE COURT:** OKAY. WELL --

4 **MR. MOLUMPBY:** IT'S MY FAULT FOR GIVING YOU THAT  
5 IMPRESSION.

6 **THE COURT:** NO, IT'S NOT. AND I ALWAYS APPRECIATE  
7 LAWYERS SAY THAT. AND WHEN I WAS A LAWYER, I SAID THAT.

8 BUT FROM YOUR PERSPECTIVE YOU'RE SAYING HE'S NOT  
9 GETTING IT. AND THAT'S FAIR. AND I'M GIVING YOU A CHANCE TO TELL  
10 ME WHY I'M REALLY NOT GETTING IT.

11 **MR. MOLUMPBY:** OUR ARGUMENT IS NOT THIS WAS SUCH A  
12 LARGE FRAUD THAT THEY MUST HAVE KNOWN. THAT'S NOT OUR ARGUMENT.  
13 OR THAT WE CAN DISPENSE WITH DEMAND FUTILITY BECAUSE THIS IS  
14 SUCH A LARGE FRAUD, AND THE GOVERNMENT IS GOING TO SETTLE FOR A  
15 BILLION DOLLARS WITH ORACLE TOMORROW. I CAN'T SAY THAT. AND  
16 THAT'S NOT THE BASIS OF THE CASE. BUT I DON'T THINK THAT'S WHAT  
17 THE LAW REQUIRES.

18 WHAT I AM SAYING IS THAT BASED UPON THE FIDUCIARY  
19 DUTIES, BASED UPON THE ORACLE CHARTER, BASED UPON THE AUDIT  
20 COMMITTEE'S CHARTER, BASED UPON ORACLE'S CODE OF BUSINESS  
21 CONDUCT AND ETHICS, THE OUTSIDE DIRECTORS, THE THREE OUTSIDE  
22 DIRECTORS THAT SAT ON THE AUDIT COMMITTEE DURING THIS ENTIRE  
23 PERIOD KNEW WHAT WAS GOING ON, JUST AS IN ABBOTT, BECAUSE THAT  
24 WAS THEIR DUTY TO KNOW.

25 THE INFERENCE CAN BE DRAWN BASED UPON THE SHEAR

1 TIMING AND MAGNITUDE OF WHAT WAS GOING ON, THE INVOLVEMENT OF  
2 OUTSIDE COUNSEL, THE FACT THAT A WHITSLEBLOWER COMPLAINT WAS  
3 RAISING THESE ISSUES, THE FACT THAT THE GOVERNMENT FILED ITS OWN  
4 COMPLAINT IN INTERVENTION AND STILL NOTHING WAS DONE. ALL OF  
5 THESE FACTS IN THEIR TOTALITY THE COURT, JUST AS IN ABBOTT, CAN  
6 DRAW THAT THE AUDIT COMMITTEE MEMBERS KNEW.

7 THAT'S MY ARGUMENT. NOT THAT THEY SHOULD HAVE KNOWN  
8 JUST BECAUSE IT'S A LARGE FRAUD. BUT BECAUSE OF THE SPECIFIC  
9 RED FLAGS THAT WE'VE IDENTIFIED IN THE COMPLAINT.

10 **THE COURT:** ALL RIGHT. SO YOU'VE GOT THREE MEMBERS  
11 OF THE AUDIT COMMITTEE, AND YOU'VE GOT HOW MANY INSIDERS,  
12 THREE?

13 **MR. MOLUMPBY:** FOUR.

14 **THE COURT:** FOUR. SO, I MEAN, I'M NOT EXPECTING YOU  
15 TO CONCEDE AWAY THE OTHER OUTSIDE DIRECTORS.

16 **MR. MOLUMPBY:** RIGHT.

17 **THE COURT:** BUT THAT'S THE STRONGEST, IF YOU WILL --

18 **MR. MOLUMPBY:** THAT'S CORRECT.

19 **THE COURT:** -- ARGUMENT FOR YOU.

20 **MR. MOLUMPBY:** YES.

21 **THE COURT:** FOUR INSIDERS PLUS AUDIT COMMITTEE  
22 MEMBERS.

23 **MR. MOLUMPBY:** THAT'S CORRECT. AND, BY THE WAY, WE  
24 DID NOT SUE ALL THE DIRECTORS. THAT'S NOT OUR PRACTICE TO DO  
25 SO.

1           **THE COURT:**   RIGHT.   TWO YOU DID NOT.

2           **MR. MOLUMPHY:**   TWO RECENT ONES THAT FRANKLY WERE ON  
3   THE BOARD FOR SUCH A SHORT TIME. BUT I DON'T KNOW IF THAT WAS AN  
4   IMPLICATION. I DON'T THINK HE MEANT THAT. BUT THAT CERTAINLY  
5   IS NOT IN OUR COMPLAINT.

6           WE DID IDENTIFY IN THOSE PEOPLE WHO WE BELIEVE HAVE  
7   RESPONSIBILITY UNDER THE ABBOTT CASE. AND THEY CAN'T SIMPLY SAY  
8   THAT LACKING SOME DECLARATION OR LACKING SOME EVIDENCE OF A  
9   REPORT HANDED TO AN AUDIT COMMITTEE MEMBER, YOU CAN'T PROCEED.  
10   WE DON'T THINK THAT'S WHAT DELAWARE LAW REQUIRES.

11           AND, FRANKLY, AS INTERPRETED BY FEDERAL COURTS WITH  
12   THE INFERENCES THAT'S NOT WHAT THE FEDERAL COURTS REQUIRE. AND  
13   THAT'S CERTAINLY NOT THE CASE IN ABBOTT.

14           IF THE COURT WAS TO CONSIDER LEAVE, GRANTING A  
15   MOTION, WE WOULD OBVIOUSLY REQUEST LEAVE TO AMEND. AND MY  
16   CO-COUNSEL IS PREPARED TO DISCUSS THE INDIVIDUAL CAUSES OF  
17   ACTION, IF YOU WANT TO.

18           **THE COURT:**   WELL, WHY DON'T WE TOUCH ON THAT, AND  
19   THEN I'LL GO BACK TO THE DEFENSE. BUT WHILE WE'RE WITH THE  
20   PLAINTIFFS, WHY DON'T YOU GO AHEAD AND ADDRESS THE 12 (B) (6)  
21   ISSUES WITH RESPECT TO THE INDIVIDUALS?

22           **MR. MOLUMPHY:**   THANK YOU.

23           **MR. KELSON:**   THANK YOU, YOUR HONOR.

24           **THE COURT:**   THANK YOU.

25           **MR. KELSON:**   AND IF I MAY FOR A MOMENT LOOK AT THE



1 WORDS THE COURT USED:

2 "I SEE A LOT OF SMOKE, BUT I DON'T SEE A FIRE."

3 AND IF I MAY MAKE AN ASSUMPTION OR TWO, IF THIS COURT  
4 ON THE BENCH WERE TO NOTICE BY MR. ETH A LOT OF SMOKE, AND BY  
5 THE LAW CLERKS, A LOT OF SMOKE, AND SAID:

6 "THANK YOU. THAT'S ALL WE'RE GOING TO BE HEARING  
7 TODAY" --

8 **THE COURT:** THAT'S ENOUGH FOR A 12 (B) (6).

9 **MR. KELSON:** WELL, WHAT IS IT IN CONSCIOUS DISREGARD  
10 OF? A LOT OF SMOKE. AND WHAT SHOULD BE DONE IN THOSE  
11 CIRCUMSTANCES?

12 SAME SITUATION IF A SAILOR OR TWO WERE TO CROSS THE  
13 ATLANTIC AND KNEW THAT ICEBERGS IN THE NORTH ATLANTIC DURING THE  
14 MONTH OF OCTOBER ARE A FREQUENT OCCURRENCE:

15 "CAPTAIN, DON'T BOTHER WITH THE RADAR. FULL  
16 STEAM AHEAD."

17 THAT'S A CONSCIOUS DISREGARD OF SOMETHING. NOW, THE  
18 DELAWARE COURTS HAVE ADDRESSED A CONSCIOUS DISREGARD OF  
19 SOMETHING. AND THAT WAS IN THE CONTEXT OF THE WALT DISNEY CASE.

20 AND IN THAT CASE THAT I'M QUOTING FOR THE COURT NOW:

21 "THE NEW ALLEGATIONS GIVE RISE TO A COGNIZABLE  
22 QUESTION WHETHER THE DEFENDANT DIRECTORS OF THE  
23 WALT DISNEY COMPANY SHOULD BE HELD PERSONALLY LIABLE  
24 TO THE CORPORATION FOR A KNOWING OR INTENTIONAL LACK  
25 OF DUE CARE IN THE DIRECTORS' DECISION-MAKING

1 PROCESS."

2 AND I THINK IF WE LOOK AT OUR SITUATION, WHICH  
3 DOESN'T ARISE IN THE ABSTRACT, WHICH DOES NOT ARISE FROM AN  
4 ISOLATED OCCURRENCE OF A SALESMAN IN ALEXANDRIA NOT TELLING THE  
5 GOVERNMENT ABOUT A DISCOUNT HE GAVE, BUT A SYSTEMIC SITUATION AS  
6 FOUND BY GSA, THAT PERMEATES FROM 1998 TO 2006, AT A MINIMUM.

7 IN THAT SORT OF A SITUATION, IF THE DIRECTORS  
8 IGNORING THE RED FLAGS -- AND THERE'S NO DIFFERENCE BETWEEN US  
9 THAT RED FLAGS WERE OUT THERE. THE DIFFERENCE BETWEEN US IS THE  
10 DEFENSE IS SAYING:

11 "WELL, THE RED FLAG DOES NOT CONSTITUTE  
12 KNOWLEDGE OF A DIRECTOR OF THIS PARTICULAR OFFENSE."

13 WE'RE SAYING SOMETHING ELSE. WHAT WE'RE SAYING IS  
14 THOSE RED FLAGS IN A LANDSCAPE, A TERRAIN OF SALES, A BILLION  
15 DOLLARS WORTH OF SALES GIVE RISE TO A CONSCIOUS DISREGARD BY THE  
16 DIRECTORS.

17 IF THE DIRECTORS DON'T USE THE ACCESS INFORMATION  
18 THAT MR. ETH HAS ADMITTED THEY HAVE, THAT DON'T INQUIRE AS TO:  
19 HOW IS THIS CASE, THIS POTENTIAL CASE OF SALES THAT'S IMPORTANT  
20 TO OUR COMPANY'S WELL-BEING DIFFER FROM OUR PRIOR SETTLEMENT AT  
21 ORACLE UNIVERSITY WHERE THE SAME GSA CONTRACT WAS INVOLVED,  
22 WHERE WE HAVE KETON ALLEGATIONS? HOW CAN A BOARD IN EXERCISING  
23 ITS DUTIES NOT LOOK AT THAT SITUATION?

24 **THE COURT:** FOR ABUSE OF FIDUCIARY DUTY ON AN  
25 INDIVIDUAL BASIS FOR THESE DIRECTORS, AS I UNDERSTAND IT UNDER

1 DELAWARE LAW, IS THEY ARE PROTECTED, IF YOU WILL, FOR ANYTHING  
2 UP TO GROSS NEGLIGENCE, RIGHT?

3 **MR. KELSON:** BUT --

4 **THE COURT:** WELL, IS IT RIGHT?

5 **MR. KELSON:** RIGHT, BUT --

6 **THE COURT:** OKAY.

7 **MR. KELSON:** -- AND THE BUT, IF I MAY, YOUR HONOR, IS  
8 A BIG BUT. AND THAT IS THERE'S AN EXCEPTION FOR WRONGFUL  
9 CONDUCT, INTENTIONAL MISCONDUCT.

10 **THE COURT:** WELL, SURE. I MEAN, THAT'S -- INTENTIONAL  
11 MISCONDUCT IS BEYOND GROSS NEGLIGENCE.

12 **MR. KELSON:** BUT IF WE SEE THE SMOKE AND CLOSE THE  
13 DOOR AND WALK AWAY, IS THAT INTENTIONAL?

14 IF WE GO IN THE OCEAN AND IGNORE THE ICEBERGS AND SAY  
15 "FULL STEAM AHEAD," IS THAT CONSCIOUS DISREGARD?

16 IF WE KNOW THAT OUR OWN COMPANY IN 2003 HAS BEEN  
17 SUBJECT TO A KETON ACTION FOR THE SAME CONTRACT FOR SALES  
18 IMPROPERLY DEFRAUDING THE GOVERNMENT --

19 **THE COURT:** YOUR AVERMENTS DON'T LINK UP IN MY MIND  
20 TO THE ANALOGY OF:

21 "DAMN THE TORPEDOES, FULL SPEED AHEAD," OR "WHO  
22 CARES ABOUT THE ICEBERGS? LET'S GO FORWARD."

23 IT IS AT MOST LOTS OF THINGS ARE GOING ON, AND THEY  
24 ARE SLEEPING AT THE SWITCH. I KNOW WE'RE MIXING THE METAPHORS  
25 HERE, BUT, YOU KNOW, IT'S NOT THIS BEING DIRECTLY APPRISED OF A

1 PROBLEM AND SAYING:

2 "I DON'T CARE. WE'RE GOING TO CONTINUE TO DO  
3 WHAT WE'RE GOING TO DO."

4 IT IS A STEP LESS THAN THAT. IT IS VARIOUS THINGS.  
5 USING YOUR TERM RED FLAGS ARE OUT THERE, AND YOUR AVERMENTS ARE  
6 SIMPLY SAYING NOBODY IS PAYING ANY ATTENTION.

7 I MEAN, ISN'T THAT A LOT CLOSER TO GROSS NEGLIGENCE?

8 **MR. KELSON:** NO, I THINK THIS IS CONSCIOUS DISREGARD.  
9 THIS IS THE CLOSING OF THE DOOR OF THE COURTROOM WITH THE SMOKE  
10 IN THE COURTROOM. THAT'S A CONSCIOUS DISREGARD. IT'S NOT  
11 MERELY NEGLIGENT.

12 AND WITH WHATEVER ANALOGY, IF ONE'S FOUND GUILTY OF A  
13 KETON VIOLATION UNDER THE SAME CONTRACT BY A SUBSIDIARY OF YOUR  
14 COMPANY, I THINK THAT BEHOOVES THE COMPANY AND ITS DIRECTORS TO  
15 SAY:

16 "WHAT ARE WE DOING ABOUT THIS? I WANT ANSWERS,  
17 AND I WANT IT ON MY DESK."

18 AND IF I'M A DIRECTOR I DEMAND TO SEE THOSE ANSWERS.  
19 AND IF I CAN'T GET THOSE ANSWERS, I'M NOT GOING TO BE A DIRECTOR  
20 IN THIS ORGANIZATION.

21 **THE COURT:** LET ME ASK YOU -- AND I'M NOT -- I DON'T  
22 WANT TO SPEND MORE THAN A MINUTE OR TWO ON THIS.

23 I'M NOT SURE IT REALLY MATTERS IN SOME WAYS IN THIS  
24 CASE. IF WE'RE TALKING ABOUT THE HEIGHTENED RULE 8 OF THE  
25 IQBAL, TWOMBLY OR THE 9 (B) OF FRAUD CASE.

1                   THIS IS, AS I UNDERSTAND IT, ABUSE OF FIDUCIARY DUTY  
2 CLAIM. AND THEN, THERE ARE TWO OTHER CLAIMS, ALTHOUGH THEY SEEM  
3 TO BE SOMEWHAT THE SAME. AND THAT'S ONE IS UNJUST ENRICHMENT,  
4 WHICH I'M NOT SURE IS A STANDALONE CLAIM. AND THEN, THE OTHER  
5 CLAIM IS FOR ABUSE OF CONTROL.

6                   **MR. MOLUMPHY:** CONTROL.

7                   **THE COURT:** WHICH IN A SENSE IN MY MIND IS PRETTY  
8 SIMILAR TO ABUSE OF FIDUCIARY DUTY. YOUR ARGUMENT IS IT'S RULE  
9 8, RIGHT?

10                  **MR. KELSON:** THAT'S RIGHT.

11                  **THE COURT:** OKAY. AND THAT'S BECAUSE IT DOESN'T  
12 SOUND IN FRAUD OR --

13                  **MR. KELSON:** IT'S BECAUSE WE LOOKED AT THE DECISION  
14 THE DEFENDANTS RELIED ON IN THEIR OPENING PAPERS, DAISY. AND  
15 DAISY MAKES A CLEAR DISTINCTION BETWEEN RULE 8 AND RULE 9 (B).  
16 AND IN THAT CASE, ALTHOUGH THERE WAS A FRAUD INVOLVED WITH THE  
17 CORPORATION, AND THE CORPORATION HAD BEEN SUED FOR THAT, THERE  
18 WAS ALSO A CLAIM FOR VIOLATION OF FIDUCIARY DUTY AGAINST THE  
19 DIRECTORS.

20                         AND EVEN THOUGH A FACTUAL ANALYSIS TRIAL WOULD  
21 PROBABLY BEAR UPON ACTS WHICH MIGHT CONSTITUTE FRAUD, IT ALSO  
22 BORE UPON THOSE SAME ACTS WHICH WOULD CONSTITUTE BREACH OF  
23 FIDUCIARY DUTY.

24                         THE FACT OF THE MATTER IS WE DIDN'T BRING A FRAUD  
25 CAUSE OF ACTION. WE DID BRING A CAUSE OF ACTION FOR THE

1 INTENTIONAL -- WELL, FOR THE VIOLATION OF FIDUCIARY DUTIES. IT'S  
2 A DIFFERENT CAUSE OF ACTION. THEIR CASE, DAISY, STANDS FOR THE  
3 PROPOSITION THAT THE LOWER STANDARD OF REVIEW WILL APPLY.

4 **THE COURT:** AND AS I SAID I'M NOT SURE IN ACTUALITY  
5 NOW IT IS THAT DIFFERENT, NOT THAT RULE 8 HAS BEEN WRITTEN OUT  
6 BY ANY MEANS.

7 BUT IN THIS KIND OF CASE, UNDER THE CURRENT DIRECTION  
8 WE GET, I THINK YOU DO HAVE TO PLEAD WITH SOME -- WELL, YOU HAVE  
9 TO PLEAD IT'S PLAUSIBLE. AND YOU HAVE TO PLEAD WITH SOME LEVEL  
10 OF PARTICULARITY A CLAIM OF THIS KIND. AND I'M NOT SURE IT'S  
11 ALL THAT DIFFERENT THAN 9 (B). BUT BE THAT AS IT MAY --

12 **MR. KELSON:** I'M NOT SURE WE DISAGREE, YOUR HONOR.  
13 AND IF WE LOOK AT THE DELAWARE CASE LAW, AND IN PARTICULAR BACK  
14 AGAIN TO THE WALT DISNEY CASE, THE COURT THERE RECOGNIZING THAT  
15 IT WAS INCUMBENT UPON THE PLAINTIFFS WITH PARTICULARITY TO MAKE  
16 THEIR ALLEGATIONS SAID THAT:

17 "SINCE THE DEFENDANTS HAVE GONE BEYOND THE  
18 PLEADINGS, I'M GOING TO ALLOW DISCOVERY."

19 AND MORE THAN THAT, THERE ARE DISCOVERY MEANS  
20 INDEPENDENT OF LITIGATION. IN CALIFORNIA IT'S 1601 OF THE  
21 CORPORATIONS CODE.

22 DELAWARE HAS A SECTION 220: DEMAND FOR INSPECTION OF  
23 RECORDS AND BOOKS.

24 WE'VE DONE THAT IN THIS CASE. AND WE HAVE A RESPONSE  
25 DATE OF JUNE 14TH FOR ADDITIONAL INFORMATION THAT ASKS THE VERY

1 QUESTIONS THIS COURT IS ASKING TODAY:

2 WHAT DIRECTOR KNEW WHAT? WHAT DID YOU SEE? WHAT  
3 DOCUMENTS CAME BEFORE YOU? WHAT WAS THE AGENDA? WHAT WERE THE  
4 MOTIONS? WHAT WERE THE TRANSCRIPTS? LET US SEE THAT.

5 WE HAVE THAT DEMAND BEFORE THE CORPORATION. AND  
6 UNDER DELAWARE LAW, BOTH THE VERIFONE CASE, WHICH I BELIEVE IS  
7 IN THE PAPERS, AND ALSO IN THE WALT DISNEY CASE WHICH IS -- AND  
8 I'M REFERRING TO 825 ATLANTIC 2D 275.

9 IN THOSE CASES THE COURTS HAVE HELD THAT INDEPENDENT  
10 OF THE LITIGATION, INDEPENDENT OF OUR RIGHTS IN LITIGATION FOR  
11 DISCOVERY WE CAN GO THROUGH AN INSPECTION OF BOOKS AND RECORDS.

12 AND BASED UPON THAT INSPECTION AND THE RESULTS FROM  
13 THE CORPORATION BRING BEFORE THE COURT BY WAY OF AMENDED  
14 PLEADINGS, OR WHATEVER, BRING BEFORE THE COURT THOSE ADDITIONAL  
15 PARTICULAR FACTS WHICH MAY ADDUCE OR PROVIDE THE BASIS FOR THE  
16 INFERENCES THAT THE COURT MIGHT SEEK IN THIS CASE.

17 **THE COURT:** HAS THE DELAWARE COURT GRANTED YOUR  
18 ACCESS TO, OR IS THAT BEING LITIGATED AT THE MOMENT?

19 **MR. KELSON:** IT'S A CALIFORNIA COURT, YOUR HONOR. WE  
20 WENT UNDER SECTION 1601. AND ONE OF THE ISSUES IS GOING TO BE  
21 WHETHER OR NOT WE HAVE A GOOD FAITH RESPONSE TO THAT OR WHETHER  
22 OR NOT WE HAVE TO FILE FOR THE ASSISTANCE OF THE COURTS.

23 **THE COURT:** I REMEMBER IN ONE OF THE CASES I HANDLED  
24 BEFORE THE PLAINTIFFS REQUESTED LEAVE TO GO AND MAKE A 221  
25 REQUEST IN DELAWARE, AND THEN WERE SHUT DOWN IN DELAWARE AND

1 WEREN'T ALLOWED TO GET ACCESS TO THE INFORMATION. AND THAT'S  
2 WHY I WAS ASKING WHERE YOU STOOD, BUT OKAY.

3 THIS MAY ACTUALLY GO BACK TO THE EARLIER DISCUSSION,  
4 BUT LET ME JUMP AHEAD FOR A MOMENT WHILE YOU ARE UP HERE TO THE  
5 QUESTION OF YOUR PARTICULAR SHAREHOLDER PLAINTIFFS AND THE  
6 ARGUMENT WITH RESPECT TO WHETHER OR NOT THERE'S BEEN A  
7 SUFFICIENT AVERMENT AS TO THEIR OWNERSHIP AT THE OPERATIVE  
8 MOMENTS.

9 **MR. KELSON:** THANK YOU, YOUR HONOR.

10 I APPRECIATE THE COURT'S INQUIRY. AND I'D LIKE TO  
11 NAIL THAT DOWN.

12 **THE COURT:** OKAY.

13 **MR. KELSON:** GOING TO OUR CONSOLIDATED COMPLAINT,  
14 WHICH IS THE COMPLAINT AND PLEADING AT ISSUE BEFORE THE COURT,  
15 WE STATE IN PARAGRAPH 12 OF THE COMPLAINT, AND I QUOTE:

16 "PLAINTIFF, PHILIP T. PRINCE," PAREN, QUOTE,  
17 "PRINCE," END QUOTE, END PAREN, "A RESIDENT OF  
18 ALAMEDA COUNTY, CALIFORNIA, IS THE OWNER OF 450  
19 SHARES OF ORACLE COMMON STOCK. PLAINTIFF HAS  
20 OWNED ORACLE SHARES SINCE NO LATER THAN 1996, AND AT  
21 ALL TIMES RELEVANT HEREIN, AND CONTINUES TO BE AN  
22 ORACLE SHAREHOLDER."

23 SO DURING THE DURATION OF THE PERIOD OF DAMAGES AT  
24 ISSUE IN THIS CASE WE CLEARLY ALLEGE THAT MR. PRINCE HAS OWNED  
25 HIS COMMON SHARES AT ALL TIMES DURING THAT PERIOD.



1           **THE COURT:**   AND THEN, THE PARAGRAPH BEFORE ABOUT  
2   MS. GALAVIZ, THAT'S GOT THE "ALL RELEVANT TIMES," BUT IT DOESN'T  
3   HAVE THE TRIGGERING "NO LATER THAN" LANGUAGE.

4           **MR. KELSON:**   IT READS THE WAY IT DOES, YOUR HONOR.  
5   BUT I BELIEVE THAT IN TERMS OF OWNERSHIP OF SHARES WE'VE  
6   CERTAINLY ALLEGED IT WITH MR. PRINCE.   AND IF THE COURT WOULD  
7   LIKE AN AMENDMENT AS TO MS. GALAVIZ, I'M SURE WE CAN DO THAT.

8           THIS SHOULD NOT BE AN ISSUE IN THE CASE.

9           **THE COURT:**   ALL RIGHT. ANYTHING FURTHER ON THAT?   AND  
10   THEN, I'LL ASK MR. ETH IF HE WANTS TO RESPOND ON THE POINTS  
11   YOU'VE MADE.   AND THEN, ALSO I HAVE SOME QUESTIONS FOR YOU ON  
12   THE -- STILL ON THE DEMAND FUTILITY POINTS.

13          **MR. MOLUMPBY:**   THANK YOU, YOUR HONOR.

14          **THE COURT:**   ANYTHING FURTHER?

15          THANK YOU.

16          LET ME FOCUS YOU FIRST ON THE ORACLE CHARTER ISSUE  
17   AND THE ARGUMENT THAT UNDER THE TERMS OF THE CHARTER THE AUDIT  
18   COMMITTEE HAS A RESPONSIBILITY, A PARTICULAR RESPONSIBILITY WITH  
19   RESPECT TO THE GOVERNMENT CONTRACTS AND PERHAPS A, YOU KNOW,  
20   FOCUSSED DUTY TO BE ON THE SPOT WITH RESPECT TO THOSE ISSUES.

21          **MR. ETH:**   YOUR HONOR, THAT TAKES THIS WHOLE AREA OF  
22   THE LAW AND TURNS IT UPSIDE DOWN.   IT TURNS IT INTO STRICT  
23   LIABILITY FOR AUDIT COMMITTEE MEMBERS.

24          CASE AFTER CASE IN THIS DISTRICT, IN DELAWARE, THE  
25   NINTH CIRCUIT, EVERYWHERE HAS SAID:

1 "YOU CAN'T LOOK AT CHARTERS. YOU CAN'T LOOK AT  
2 COMMITTEE MEMBERSHIP. YOU HAVE TO ACTUALLY PLEAD  
3 PARTICULARS. IT CAN'T BE: 'WELL, YOU KNOW WHAT THEY  
4 KNEW, BECAUSE THEY ARE ON THE AUDIT COMMITTEE. AND  
5 YOU KNOW WHAT THAT REPORT MUST SAY.'"  
6 THAT'S WHAT COUNSEL DID, HE SAID:

7 "YOU KNOW WHAT IT'S LIKE WHEN YOU HIRE AN  
8 OUTSIDE LAWYER. AND YOU KNOW WHAT IT MUST SAY. AND  
9 I BET THAT THERE'S STUFF IN THERE THAT THEY HEARD  
10 BECAUSE, YOU KNOW, THEY ARE RESPONSIBLE FOR A LOT OF  
11 THINGS. BUT THEY ARE RESPONSIBLE, SO THEY MUST HAVE  
12 KNOWN ABOUT ALL OF THIS."

13 CASE AFTER CASE, VERIFONE, VERISIGN, RATTNER,  
14 GUTTMAN, WOOD VERSUS BAUM, CASE AFTER CASE THEY SAY -- I JUST  
15 HEARD COUNSEL SAY:

16 "WELL, THAT WAS THE BASIS OF ABBOTT."

17 ABSOLUTELY NOT TRUE. ABBOTT, PAGE 809, LISTS A WHOLE  
18 BUNCH OF THINGS, A WHOLE BUNCH OF THINGS, INCLUDING WHICH THEY  
19 REPEAT OVER AND OVER AGAIN:

20 "WARNING LETTERS SENT TO DIRECTORS."

21 HAPPENED THAT THE DIRECTOR WAS ALSO THE CEO. BUT  
22 WARNINGS LETTERS TO DIRECTORS. AND THEY GO ON AND ON ABOUT  
23 DIRECT EVIDENCE. DIRECT EVIDENCE.

24 PLAINTIFFS' COUNSEL STARTED BY SAYING:

25 "WELL, YOU JUST NEED A REASON TO DOUBT," AS IF

1 THIS IS A CRIMINAL DEFENSE ARGUMENT AND A REASONABLE DOUBT  
2 STANDARD.

3 AGAIN, THEY RUN FROM THE STANDARD. WOOD VERSUS BAUM,  
4 DELAWARE SUPREME COURT. PLAINTIFFS DON'T CITE IT. WE DO. WHAT  
5 DOES IT SAY?

6 YOU CAN ONLY HAVE A REASON TO DOUBT IF THEY PLEAD  
7 WITH PARTICULARITY FACTS DEMONSTRATING A SUBSTANTIAL LIKELIHOOD  
8 OF LIABILITY, NOT, WELL, THERE'S SOME SMOKE BECAUSE OTHER  
9 COMPANIES IN THIS INDUSTRY NOW, AND ORACLE UNIVERSITY, A  
10 SUBSIDIARY, WITH A COMPLETELY DIFFERENT KIND OF ISSUE ABOUT  
11 TRAVEL:

12 "WELL, YOU KNOW, IT WAS A REALLY BIG CONTRACT."

13 THE CONTRACTS HERE, HUNDREDS AND HUNDREDS OF  
14 INDIVIDUAL CONTRACTS. SALESPERSON MAKES -- THE GOVERNMENT  
15 ATTACHED IN THEIR COMPLAINT --

16 **THE COURT:** WELL, BUT THE ARGUMENT THEY ARE MAKING IS  
17 THAT THERE'S ESSENTIALLY A FAVORED NATION CLAUSE WITH RESPECT TO  
18 THE CONTRACT THAT'S THE FOCUS OF THE SCHEME ALLEGATIONS. AND  
19 THAT, THEREFORE, ALL OTHER CONTRACTS MORE OR LESS COME INTO PLAY  
20 BECAUSE THOSE HAVE TO BE TAKEN INTO ACCOUNT TO DETERMINE WHETHER  
21 OR NOT THE GOVERNMENT'S GETTING ITS APPROPRIATE DISCOUNT OR NOT.

22 **MR. ETH:** BUT THE POINT IS DOES AN AUDIT COMMITTEE  
23 MEMBER OR AN OUTSIDE DIRECTOR KNOW ABOUT ALL OTHER CONTRACTS AND  
24 DISCOUNTS PRODUCT BY PRODUCT, WEEK BY WEEK DETAIL BY DETAIL?

25 THE GOVERNMENT'S CHART THAT THEY ATTACHED TO THE

1 COMPLAINT, WHICH THE GOVERNMENT ATTACHED TO THE COMPLAINT, WELL,  
2 THE CONTRACTS UNDER 5,000 HAD THIS KIND OF DISCOUNT SCHEME. AND  
3 CONTRACTS OVER \$100,000 HAD THIS KIND. AND ONES OVER 150. AND  
4 IS IT COMMERCIAL CONTRACT, OR IS IT NOT? OR WHAT GROUP DOES IT  
5 GO INTO?

6 IT'S THAT LEVEL. BUT THE FUNDAMENTAL POINT OF ALL OF  
7 THIS, OF ALL OF THIS IS THAT MEMBERSHIP ON A COMMITTEE,  
8 MEMBERSHIP ON THE BOARD DOESN'T CREATE KNOWLEDGE.

9 **THE COURT:** WELL, OKAY. AND I WILL GO BACK AND LOOK.  
10 BUT I'M NOT HEARING THE SUGGESTION THAT IT CREATES KNOWLEDGE.  
11 WHAT I'M HEARING PLAINTIFFS SAY IS WHEN WE'RE TRYING TO  
12 DETERMINE WHAT A PARTICULAR DIRECTOR KNEW, IF THE DIRECTOR SITS  
13 ON A COMMITTEE THAT HAS SPECIFIC RESPONSIBILITY OVER A  
14 PARTICULAR AREA ONE CAN MAKE AN INFERENCE.

15 IT'S NOT STRICT LIABILITY THAT THERE'S A PROBLEM IN  
16 GOVERNMENT CONTRACTS, YOU ARE ON THE AUDIT COMMITTEE, YOU ARE  
17 SOMEHOW STUCK WITH SPECIAL LIABILITY.

18 BUT IT'S MORE TRYING TO DETERMINE THE LEVEL OF  
19 KNOWLEDGE AND MAKING INFERENCES, WHICH WE DO MAKE. ONE COULD,  
20 FOR EXAMPLE, INFER THAT BECAUSE GOVERNMENT CONTRACTS ARE A  
21 PARTICULAR RESPONSIBILITY OF A COMMITTEE THAT ONE CAN INFER THEY  
22 HAVE SEEN MATERIALS.

23 IT'S NOT ASCRIBING LIABILITY TO THEM. IT'S TRYING TO  
24 ASSESS WHAT THEIR LEVEL OF KNOWLEDGE IS.

25 **MR. ETH:** WHAT MATERIALS DID THEY SEE? WHEN DID THEY

1 SEE IT? WHAT YEAR DID THEY SEE IT? WHAT DID IT SAY? THAT'S  
2 WHAT ALL THE CASES FOCUS ON.

3 THAT'S WHAT "PARTICULARITY" MEANS.

4 I DID HEAR COUNSEL --

5 **THE COURT:** HOW ARE THEY GOING TO BE IN A POSITION TO  
6 KNOW THAT AT THE PLEADING STAGE?

7 **MR. ETH:** DELAWARE COURTS TALK ABOUT THE WAYS THAT  
8 THEY COULD BE IN A POSITION TO KNOW THAT. I WAS VERY INTERESTED  
9 TO HEAR THAT THERE'S AN INSPECTION DEMAND WITH A DATE.

10 FIRST I'VE HEARD OF IT. FIRST I'VE HEARD OF IT. I  
11 DON'T KNOW IF YOU ARE SENDING IT OUT TODAY AFTER THE HEARING.

12 **MR. KELSON:** I THINK YOU HAVE IT, MR. ETH.

13 **MR. ETH:** WHEN DID I GET IT?

14 **MR. KELSON:** SHOULD HAVE LAST --

15 **THE COURT:** WELL, I'LL LET YOU ALL WORK ON THAT.  
16 MAYBE IT'S DIFFERENT COUNSEL.

17 **MR. ETH:** I'VE NEVER HEARD OF IT. IT COULD BE. IT  
18 COULD BE SOMETHING ELSE. I'VE NEVER HEARD OF IT.

19 BUT, ACTUALLY, WHAT THE DELAWARE COURTS DO TALK ABOUT  
20 IS THE TOOLS AT HAND. THEY TALK ABOUT THE EXTRAORDINARY REVERSAL  
21 OF THE WAY THINGS WORK BY HAVING A SHAREHOLDER TAKE OVER  
22 LITIGATION ON BEHALF OF A COMPANY.

23 AND THAT THERE ARE SOME LIMITED TOOLS AT HAND THAT  
24 THEY CAN SOMETIMES USE. OF COURSE, HERE THEY DIDN'T DO THAT AT  
25 ALL. THEY DIDN'T TRY TO FIND ANYTHING OUT. THEY JUST FILED A

1 LAWSUIT IMMEDIATELY. SO IT'S A VERY DIFFERENT, DIFFERENT  
2 SETTING.

3 IN TERMS OF THE CASE LAW I'VE MENTIONED VERIFONE AND  
4 VERISIGN AND RATTNER AND SILICON GRAPHICS AND WOOD VERSUS BAUM.

5 AND WHAT IT COMES BACK TO IS THE KEY WORD I'VE BEEN  
6 HEARING IS "LINK." WHERE IS THE LINK TO THE DIRECTORS? WHERE IS  
7 THE LINK? WHERE IS THE KNOWLEDGE? WHERE IS THAT UNDER THE  
8 PROPER STANDARD? NOT THERE'S A REASON. WE HAVE SOME REASON TO  
9 DOUBT THIS. NOT BASED ON OTHER COMPANIES, BUT BASED ON ORACLE.

10 **THE COURT:** OKAY.

11 **MS. KYLE:** JUST GLANCING AT MY NOTES TO SEE IF THERE  
12 WAS ANYTHING ELSE.

13 **THE COURT:** WELL, IF YOU WANT TO MAKE A COMMENT OR  
14 TWO WITH RESPECT TO THE CLAIMS AGAINST THE INDIVIDUAL DIRECTORS.

15 **MR. ETH:** I THINK I'M GOING TO LEAVE THAT TO MR.  
16 BESIROF. HE HAS A FEW COMMENTS.

17 **THE COURT:** OKAY.

18 **MR. BESIROF:** GOOD AFTERNOON, YOUR HONOR.

19 **THE COURT:** THERE IS, BY THE WAY, A SUGGESTION IN THE  
20 PAPERS -- AND I'M NOT SURE THE PLAINTIFFS ARE REALLY IN A  
21 POSITION TO SUGGEST THIS -- BUT JUST TO ASSUAGE MY CONCERN THAT  
22 YOU'VE THOUGHT ALL THIS THROUGH, YOU ARE REPRESENTING BOTH THE  
23 COMPANY?

24 **MR. ETH:** YES.

25 **THE COURT:** AND THE INDIVIDUAL DIRECTORS?

1           **MR. ETH:**    THAT'S CORRECT.

2           **THE COURT:**   IN A DIFFERENT CONTEXT ASSESSING A  
3 FAIRNESS OF A SETTLEMENT THAT WAS IN ISSUE THAT JUDGE WALKER HAD  
4 TAKEN UP, PERHAPS YOU JUST WANT TO COMMENT ON THAT.

5           **MR. ETH:**    I THINK THE COURT HAS BEEN HINTING AT THE  
6 EXACT DISTINCTION. IT'S A DIFFERENT SETTING, VERY DIFFERENT  
7 SETTING. THE SETTING OF A -- THAT'S IN A SETTLEMENT. AND THE  
8 COMMON PRACTICE, THE ACCEPTED PRACTICE IS AT THIS STAGE, THE  
9 DEMAND FUTILITY STAGE -- AND THAT'S WHAT ALL THESE CASES WILL  
10 SHOW -- THE DEMAND FUTILITY STAGE, COUNSEL, OUTSIDE COUNSEL CAN  
11 REPRESENT BOTH THE CORPORATION, THE NOMINAL DEFENDANT, AND THE  
12 INDIVIDUALS.

13           THE SCATTERED CASE IN DELAWARE SAYS THAT, AND ALL --  
14 JUST ABOUT EVERY OTHER CASE WE HAVE CITED ACTUALLY SHOWS THAT,  
15 BECAUSE IN THOSE CASES YOU'LL SEE ONE SET OF COUNSEL  
16 REPRESENTING BOTH.

17           SO DEMAND FUTILITY IS SOMETHING THAT THE OUTSIDE --  
18 EXCUSE ME -- THE INDIVIDUAL DEFENDANTS AND THE COMPANY CAN BOTH  
19 AGREE ON.

20           THE QUESTION OF WHAT IS THE PROPER CORPORATE  
21 GOVERNANCE MECHANISM FOR THIS KIND OF LAWSUIT THAT IT SHOULD GO  
22 FIRST TO THE COMPANY. NOTICE THE COMPANY DIDN'T JOIN THE 12 (B)  
23 (6) MOTION, BECAUSE THE COMPANY IS NOT MAKING A JUDGMENT ON  
24 THAT. THAT'S THE INDIVIDUAL DEFENDANTS.

25           **THE COURT:**    OKAY. THANK YOU.

1 MR. BESIROF.

2 MR. BESIROF: THANK YOU, YOUR HONOR.

3 AT THE OUTSET OF THE HEARING YOU ASKED IF IT MATTERS  
4 HOW YOU LOOKED -- WHETHER YOU CONSIDERED RULE 8 OR RULE 9.

5 THE COURT: YES.

6 MR. BESIROF: AND THE ANSWER IS: IF YOU DO A  
7 SUBSTANTIVE REVIEW OF THE 12 (B) (6), THE ANSWER IS YES, IT  
8 MATTERS. AND THE REASON IT MATTERS IS BECAUSE NINTH CIRCUIT LAW  
9 REQUIRES THAT YOU USE RULE 9 (B) IN THAT INSTANCE.

10 THE COURT: I SUPPOSE YOU WOULD ARGUE IT DOESN'T  
11 MATTER TO THE EXTENT YOU DON'T THINK IT SATISFIES EITHER RULE 8  
12 UNDER TWOMBLY AND IQBAL OR RULE 9 (B).

13 MR. BESIROF: IT'S NOT DETERMINATIVE OF THE OUTCOME,  
14 BUT IT DOES -- BECAUSE EITHER UNDER RULE 8 OR RULE 9 (B) IT  
15 FAILS, BECAUSE IT CERTAINLY MATTERS BECAUSE THE NINTH CIRCUIT  
16 REQUIRES IT.

17 THE COURT: OKAY. AND WHY IS IT THAT AN ABUSE OF  
18 FIDUCIARY DUTY CLAIM --

19 MR. BESIROF: YES.

20 THE COURT: -- IS SUBJECT TO 9 (B)?

21 MR. BESIROF: AND THAT'S BECAUSE YOU DON'T LOOK AT  
22 THE LABEL THAT'S PUT ON THE CAUSE OF ACTION. YOU LOOK AT WHAT  
23 IS ALLEGED. YOU LOOK AT: IS IT A FRAUD-BASED CLAIM?

24 THE COURT: RIGHT.

25 MR. BESIROF: AND HERE SINCE PLAINTIFFS ALLEGE



1 INTENTIONAL DECEPTION THAT THE DIRECTORS AUTHORIZED THE COMPANY  
2 TO DEFRAUD THE UNITED STATES, AND THAT IS THE SAME FACTUAL BASIS  
3 THAT UNDERLIES ALL THE CLAIMS, YOU APPLY 9 (B) .

4 **THE COURT:** NOW, PLAINTIFFS' COUNSEL INVOKED -- I  
5 THINK IT WAS THE DAISY CASE; THAT THEY INDICATED DID THE  
6 ANALYSIS ON A 12 (B) MOTION UNDER -- USING RULE 8.

7 **MR. BESIROF:** YES.

8 **THE COURT:** WHEN THERE'S AN ABUSE OF FIDUCIARY DUTY  
9 ALLEGED. DO YOU THINK THE DISTINCTION IS THAT'S NOT SOUNDING IN  
10 FRAUD IN SOME FASHION?

11 **MR. BESIROF:** THAT'S EXACTLY RIGHT. THE DISTINCTION  
12 IS ONE DOESN'T LOOK AT THE LABEL OF WHAT IS THE CAUSE OF ACTION  
13 CALLED; YOU LOOK AT THE UNDERLYING CLAIM.

14 AND IN DAISY, THE RULE 8 APPLICATION HAD TO DO WITH  
15 WHETHER THE BOARD CONDUCTED A -- HAD A FAILURE TO CONDUCT AN  
16 ADEQUATE REVIEW. SO IT WAS NOT A FRAUD BASED.

17 THIS COURT HAS USED THE LANGUAGE YOU LOOK AT IF THERE  
18 IS NEGLIGENCE ALLEGED OR INNOCENT ACTS ALLEGED. AND THAT WOULD  
19 BE AN INSTANCE WHERE YOU WOULD USE RULE 8.

20 YOUR HONOR FOUND THAT IN THE SWISH CASE.

21 **THE COURT:** OKAY. THANK YOU.

22 **MR. BESIROF:** THANK YOU.

23 **THE COURT:** ANYTHING FURTHER?

24 **MR. KELSON:** YOUR HONOR, IF I MAY.

25 **MR. MOLUMPY:** GO AHEAD. AND THEN, ONE FINAL POINT.

1                   **MR. KELSON:** I JUST WANTED TO POINT OUT THE  
2 PARTICULAR PASSAGE IN THE DAISY SYSTEMS CASE WHICH, AGAIN, WAS  
3 THEIR CASE. AND THE COURT IN HOLDING THAT THE 9 (B) REQUIREMENT  
4 DOES NOT ATTACH TO A BREACH OF FIDUCIARY DUTY STATES -- AND THIS  
5 IS AT PAGE FOUR OF THE SLIP DECISION, QUOTE:

6                   "THOSE DIRECTORS WHO HAVE BEEN DISMISSED FROM  
7 THE CLASS ACTION HAD A DUTY TO INVESTIGATE AND TO  
8 EXERCISE DUE CARE IN OVERSEEING THE MANAGEMENT OF  
9 DAISY. REGARDLESS OF WHETHER THEY WERE INVOLVED IN  
10 THE SCHEME TO DEFRAUD."

11                  **THE COURT:** WELL, OKAY. THAT'S NOT FOCUSING ON  
12 WHETHER OR NOT IT'S RULE 8 OR RULE 9.

13                  **MR. KELSON:** THAT PASSAGE DOES FOCUS ON THAT HOLDING,  
14 THAT IT IS THE STANDARD OF RULE 8 RATHER THAN 9 (B).

15                  **THE COURT:** YES, AND -- BUT DEFENSE COUNSEL IS SAYING  
16 THAT'S BECAUSE IT DOESN'T SOUND IN FRAUD.

17                  **MR. KELSON:** THE UNDERLYING. THERE WERE ALLEGATIONS  
18 OF FRAUD IN THE CASE. THERE WERE ALLEGATIONS OF FRAUD IN THE  
19 PRIOR CLASS ACTION.

20                  **THE COURT:** OKAY.

21                  **MR. KELSON:** AND, AGAIN, IN THIS CASE, EVEN THOUGH  
22 THERE ARE ALLEGATIONS OF FRAUD IN THE KETON CASE IN TERMS OF THE  
23 SCHEME, WHAT WE'RE FOCUSING REALLY IS ON THE DERELICTIONS OF  
24 DUTY, THE GROSS DISREGARD OF THE DIRECTORS TO WHAT IT WAS  
25 INCUMBENT UPON THEM TO DO AND WHAT KNOWLEDGE THEY HAD AND WHAT

1 THEY SHOULD HAVE DONE WITH THE KNOWLEDGE.

2 **THE COURT:** RIGHT, BUT DERELICTION OF DUTY IS NOT, IN  
3 MY MIND, ANYWAY, TANTAMOUNT TO FRAUD NECESSARILY. YOU HAVE AN  
4 OBLIGATION, AND YOU MAY HAVE FALLEN DOWN ON YOUR DUTY ENTIRELY  
5 AND, THEREFORE, ABUSED YOUR POSITION OF TRUST. THAT DOESN'T  
6 NECESSARILY MEAN IT'S FRAUDULENT CONDUCT, DOES IT?

7 **MR. KELSON:** WELL, I THINK THERE WAS FRAUDULENT  
8 CONDUCT AT ISSUE IN DAISY. I THINK THERE IS FRAUDULENT CONDUCT  
9 CERTAINLY IN THE VIRGINIA KETON CASE IN TERMS OF VIOLATION OF  
10 FIDUCIARY DUTY.

11 WHETHER THAT DEMANDS FRAUD OR NOT, I DON'T THINK IT  
12 DOES. THERE MAY BE FRAUD, BUT IT DOESN'T DEMAND FRAUD. AND I  
13 THINK THE ALLEGATIONS OF OUR COMPLAINT ARE BROAD ENOUGH AND  
14 LIBERAL ENOUGH SO THAT IT'S NOT NECESSARY TO FIND THAT A  
15 PARTICULAR --

16 **THE COURT:** WELL, IN THAT SENSE, I UNDERSTAND YOUR  
17 ARGUMENT. THIS IS AN ARGUMENT THAT I THINK YOU WOULD WANT TO BE  
18 MAKING TO ME, WHICH IS A BREACH OF FIDUCIARY DUTY. WHETHER OR  
19 NOT A DIRECTOR HAS SATISFIED THEIR OBLIGATION IS NOT A QUESTION  
20 OF FRAUD OR NOT. IT'S A QUESTION OF THEIR DUTY AS A DIRECTOR.  
21 AND SO THAT'S WHY RULE 8 IN YOUR VIEW IS THE OPERATIVE --

22 **MR. KELSON:** I COULDN'T HAVE ARTICULATED IT BETTER.

23 **THE COURT:** I JUST WANTED TO MAKE SURE I UNDERSTOOD  
24 YOUR ARGUMENT.

25 MR. BESIROF.

1                   **MR. BESIROF:** I WOULD TAKE ISSUE WITH YOUR  
2 HYPOTHETICAL THERE, YOUR HONOR, BECAUSE ONE DOESN'T LOOK AT  
3 WHETHER FRAUD IS A REQUIRED ELEMENT, SO IT DOESN'T MATTER IF  
4 FRAUD IS A REQUIRED ELEMENT OF THE PARTICULAR CLAIM. BUT AS  
5 PLED, AS I UNDERSTAND THE WAY PLAINTIFFS PURPORTS TO PLEAD THEIR  
6 COMPLAINT, THERE ARE NO NONFRAUDULENT ALLEGATIONS.

7                   SO I DON'T THINK THAT WOULD BE APPLICABLE.

8                   **THE COURT:** WELL, I MEAN, I'LL GO BACK. AND THIS MAY  
9 BE SOMEWHAT MORE ESOTERIC THAN WE NEED TO FOR PURPOSES OF  
10 TODAY'S ARGUMENT. BUT DIRECTORS' DUTY, JUST THE CONCEPT OF  
11 ABUSE OF FIDUCIARY DUTY, THAT CONCEPT IS NOT TO ME A QUESTION OF  
12 WHETHER OR NOT FRAUD IS AFOOT, BECAUSE SOMEONE CAN ABUSE THEIR  
13 DUTY AND NOT BE ACTING IN A FRAUDULENT CAPACITY OR NATURE.

14                  THE QUESTION IS: IS THE NATURE OF THAT FAILURE OF  
15 DUTY ARISE OUT OF ACTIVITY THAT'S FRAUDULENT? I MEAN IF, IN  
16 FACT, YOU'VE ABUSED YOUR DUTY BECAUSE YOU'VE ENTERED INTO A  
17 FRAUDULENT SCHEME, WELL, THEN IT SOUNDS IN FRAUD.

18                  IF YOU'VE ABUSED YOUR DUTY BECAUSE YOU DON'T SHOW UP  
19 FOR BOARD MEETINGS, THAT'S NOT NECESSARILY FRAUDULENT, BUT IT  
20 COULD BE AN ABUSE OF YOUR FIDUCIARY OBLIGATIONS. AND IN THAT  
21 INSTANCE IT WOULD BE A RULE 8 ISSUE. BUT I'LL GO BACK AND TAKE  
22 A LOOK AT IT.

23                  ONE MORE?

24                  **MR. MOLUMPY:** ONE MORE, I PROMISE. AND I APPRECIATE  
25 THE LATE HOUR. JUST ADDRESSING ONE SPECIFIC POINT BY MR. ETH,

1 AND THAT'S THIS WHOLE IDEA OF THE AUDIT COMMITTEE AND WHETHER  
2 THE MEMBERSHIP BY ITSELF. AND WE'RE NOT SUGGESTING THAT.

3 I WOULD REFER YOUR HONOR TO 325 F.3D AT PAGE 805 IN  
4 THE ABBOTT CASE. AND THIS IS WHERE THE COURT SAID:

5 "PLAINTIFFS IN ABBOTT ALLEGE FACTS THAT THE  
6 DIRECTORS WERE AWARE OF KNOWN VIOLATIONS PROVIDING  
7 EVIDENCE THAT THERE WAS DIRECT KNOWLEDGE THROUGH THE  
8 WARNING LETTERS AND AS MEMBERS OF THE AUDIT  
9 COMMITTEE. UNDER PROPER CORPORATE GOVERNANCE  
10 PROCEDURES, THE EXISTENCE OF WHICH IS NOT CONTESTED  
11 BY EITHER PARTY IN ABBOTT, INFORMATION OF THE  
12 VIOLATIONS WOULD HAVE BEEN SHARED AT THE BOARD  
13 MEETINGS," CLOSE QUOTE.

14 THE COURT IS NOT REQUIRING THAT THEY WERE. THE COURT  
15 IS DRAWING AN INFERENCE, A REASONABLE INFERENCE BASED UPON THE  
16 AUDIT COMMITTEE'S CHARTER THAT THEY WOULD HAVE BEEN.

17 **THE COURT:** WELL, I WILL -- BECAUSE BOTH SIDES HAVE  
18 SPENT A GOOD DEAL OF TIME TALKING ABOUT ABBOTT LABS, I'LL GO  
19 BACK AND REREVIEW IT, BECAUSE EVERYBODY IS INDICATING IT IS OF  
20 CONSEQUENCE.

21 **MR. MOLUMPBY:** AND, FINALLY, WE DID SERVE THE DEMAND  
22 ON THE COMPANY ITSELF, AS THE STATUTE REQUIRES. WE BELIEVE A  
23 COPY WAS SENT TO MR. ETH AS A COURTESY. I WILL CERTAINLY  
24 PERSONALLY FOLLOW-UP AND MAKE SURE HE RECEIVES A COPY TODAY. THE  
25 POINT IS THAT THE PROCESS IF THEY DO OBJECT TO PRODUCTION ON THE

1 14TH, WOULD REQUIRE US TO FILE A COMPLAINT. I UNDERSTAND IT'S  
2 AN EXPEDITED PROCEEDING. BUT IF THE COURT WAS INCLINED TO GRANT  
3 LEAVE TO AMEND WE WOULD RESPECTFULLY REQUEST THE OPPORTUNITY TO  
4 COME BACK AT A CONFERENCE OR TO HAVE ENOUGH TIME TO FINALIZE  
5 THAT PROCESS.

6 **THE COURT:** OKAY.

7 **MR. MOLUMPBY:** THANK YOU.

8 **THE COURT:** THIS WAS ALSO ON FOR A CASE MANAGEMENT  
9 CONFERENCE. LET ME -- I DID LOOK AT YOUR STATEMENT.

10 ON THE ONE HAND, I ADMIRE YOUR CONFIDENCE THAT THE  
11 CASE IS GOING TO BE DISPOSED OF.

12 I DO LIKE, THOUGH, TO HAVE PROPOSED DATES, WHICH I  
13 DON'T THINK INDICATES ANY LACK OF CONFIDENCE IN YOUR VIEW, AND  
14 THE DEFENSE SIDE SAYS:

15 "WELL, WE'RE GOING TO WIN, SO WE'RE NOT GOING TO  
16 PROVIDE DATES HERE."

17 SO IN THE FUTURE I DO LIKE TO HAVE THE DATES. BUT AT  
18 THE SAME TIME, I DON'T THINK THAT THIS IS THE POINT AT WHICH I  
19 WANT TO START SETTING DATES. I THINK WE NEED TO GET THROUGH  
20 THIS.

21 I RECOGNIZE THE PLAINTIFFS WANT TO GET GOING, AND  
22 I'VE READ YOUR REASONS FOR THINKING THAT YOU SHOULD BE LAUNCHED  
23 IN THAT REGARD AT THIS POINT. BUT I WANT TO GET THE PLEADINGS  
24 PROCESS SETTLED FIRST. I THINK IT'S IN EVERYBODY'S INTEREST.  
25 SO I'M NOT GOING TO SET ANY DATES TODAY, BUT YOU CAN BE ASSURED

1 THAT WHEN THE ORDER DOES ISSUE WITH RESPECT TO THE PLEADINGS  
2 PROCESS I WILL SET AN EARLY CASE MANAGEMENT CONFERENCE SO THAT  
3 WE GET IT UP AND RUNNING SHOULD IT BE GOING IN THAT DIRECTION.

4 **MR. ETH:** YOUR HONOR, MAY I JUST SAY ONE MORE THING?  
5 IT WILL TAKE 15 SECONDS.

6 **THE COURT:** OKAY.

7 **MR. ETH:** WHEN YOU'RE LOOKING AT ABBOTT, ALSO LOOK AT  
8 THE MULTIPLE CASES WE CITED ON PAGE 13 OF OUR OPENING BRIEF ON  
9 THIS EXACT POINT, CASES FROM THE NORTHERN DISTRICT AND FROM  
10 DELAWARE, NOT JUST FROM THE SEVENTH CIRCUIT.

11 **THE COURT:** OKAY.

12 **MR. ETH:** THANK YOU.

13 **THE COURT:** FAIR ENOUGH.

14 **MR. KELSON:** THANK YOU, YOUR HONOR.

15 **THE COURT:** THANK YOU VERY MUCH.

16 **MR. KELSON:** THANK YOU, YOUR HONOR.

17 **THE COURT:** THANK YOU.

18 (THEREUPON, THIS HEARING WAS CONCLUDED.)  
19  
20  
21  
22  
23  
24  
25

## 1 CERTIFICATE OF REPORTER

2 I, KATHERINE WYATT, THE UNDERSIGNED, HEREBY CERTIFY  
3 THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED  
4 SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED BY ME INTO  
5 TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE  
6 RECORD OF SAID PROCEEDINGS.

7 I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR  
8 ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING  
9 PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE  
10 OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

11 THE FEE CHARGED AND THE PAGE FORMAT FOR THE  
12 TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL  
13 CONFERENCE.

14 IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS  
15 7TH DAY OF JUNE, 2011.

16  
17  
18  
19 \_\_\_\_\_  
20 /S/ KATHERINE WYATT  
21  
22  
23  
24  
25

KATHERINE WYATT, OFFICIAL REPORTER, CSR, RMR (925) 212-5224